

2619
No. 12451

United States
Court of Appeals
for the Ninth Circuit.

CHICAGO, MILWAUKEE, ST. PAUL & PA-
CIFIC RAILROAD COMPANY, a corpora-
tion,

Appellant,

vs.

MARY ANN HARRINGTON,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana.

FILED

APR -5 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Montana

No. 245

MARY ANN HARRINGTON,

Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PA-
CIFIC RAILWAY COMPANY, a corpora-
tion,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action
alleges:

I.

That at all of the times herein mentioned the plaintiff was a resident and citizen of the State of Montana, and resided in the City of Butte, Montana; that the defendant, the Chicago, Milwaukee, St. Paul & Pacific Railway Company, is a corporation duly organized under and by virtue of the laws of the State of Wisconsin, and was such corporation during all of the times herein mentioned. That the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

II.

That the defendant corporation is now, and was at all of the times herein mentioned, the owner of

and engaged in the operation of its railroad in Interstate Commerce; that defendant corporation's main passenger line has its Western terminal at the City of Tacoma, Washington, and passes through the City of Seattle on its journey eastward through the states of Washington, Idaho, Montana, South Dakota, Minnesota, Wisconsin and into the State of Illinois.

III.

That on the 26th day of August, 1947, the plaintiff, accompanied by her daughter, Margaret, boarded the eastbound "Hiawatha" train of the defendant corporation as a passenger for hire, and was at said time the owner of a ticket entitling her to passage to the City of Butte, Montana, and had in addition thereto purchased from the defendant corporation a sleeping car ticket entitling her and her daughter to the possession of Section 12 of Car A-16 Touralux; that the aforesaid "Hiawatha" train is advertised by the defendant corporation, and known by the traveling public as a "Streamliner"; that the aforesaid "Streamliner" is also commonly known as an "Extra Fare Train," advertised as offering superior accommodations for speed and comfort to its passengers; that the plaintiff and her daughter boarded the said train as aforesaid at the City of Seattle, Washington, at or about the hour of 2:45 p.m. on the 26th day of August, 1947, and presented their sleeping car accommodations to the porter, and were by him

escorted to Section 12, Car A-16 Touralux; that upon reaching the aforesaid Section it was found to be occupied by a person or persons claiming to hold a reservation for the accommodations; that thereupon the porter summoned the conductor who advised the plaintiff and her daughter to take one of the unoccupied seats until the matter could be adjusted; that the aforesaid porter and the conductor were each acting as the servant and employee of the defendant corporation in escorting and directing the plaintiff to her seat in the aforesaid Touralux car.

IV.

That after the aforesaid train upon which the plaintiff was then riding, had departed from Seattle for a period of time estimated by the plaintiff to be 20-30 minutes, the train came to a stop; that during the stop the conductor notified the plaintiff that the confusion in the sale of the same Section to two different parties had been adjusted, and that she could occupy Section 12 of Car A-16 Touralux. That at said time plaintiff's daughter was absent from said car, and the plaintiff, without the assistance of the porter or the conductor, attempted to make the change from her temporary seat to Section 12 of said car; that the plaintiff at said time was of the age of seventy-five years, and the conductor, in the exercise of reasonable care and caution for the safety of his passengers, and particularly this plaintiff, knew, or in the exercise of reasonable

care should have known, that the plaintiff needed assistance in order to accomplish the move to Section 12; that the defendant's servant and employee, the conductor, negligently failed to render such assistance, or to summon the porter or other employee of the defendant, to assist the plaintiff, and permitted the plaintiff, an elderly woman, to make the change, herself; that while in the act of moving to Section 12 without the assistance of any of the employees of the defendant, and while in the act of hanging up her hat, the train upon which the plaintiff was riding was violently and suddenly jerked and put into motion by the employees of the defendant without any notice or warning whatsoever, although the car in which plaintiff was riding was equipped with a public address system for such purpose; that in order to hang her hat on the hook provided by the defendant in the aforesaid Section 12, it was necessary for the plaintiff to lean over the seat to reach the hook situated at a distance of five feet above the floor of the car; that the seat over which she was required to lean was approximately two feet in width, which required the plaintiff to lean forward in order to reach the hook, and while in such an off-balance position the defendant's employees negligently and carelessly put the train into motion with a violent and unusual jerk, which caught the plaintiff off-balance, and catapulted plaintiff backward and over the arm of the opposite seat, striking her back and knocking her to the floor; from which striking and falling the plaintiff

received the injuries hereinafter set forth. That the negligent acts and omissions of the defendant corporation, its servants and employees, which proximately caused plaintiff's injuries hereinafter alleged, were as follows:

a) By negligently and carelessly selling to the plaintiff and to other persons, unknown to the plaintiff, the same Section in Car A-16 Touralux whereby through such negligence and carelessness the plaintiff was unable to permanently locate herself before leaving the City of Seattle, Washington, on her journey to her home at Butte, Montana.

b) That the defendant, its servants and employees, were negligent and careless in failing to assist the plaintiff, an elderly person, to make the change to her permanent section, upon determination that she was entitled to such section.

c) That the defendant, its servants and employees, were negligent and careless in failing to notify or warn the passengers, and particularly this plaintiff, that the train was about to start, although the car in which plaintiff was riding was equipped with a public address system provided for such purpose.

d) That the defendant was negligent and careless in failing to provide proper facilities for the accommodation of the plaintiff's coat and hat, and knew, or in the exercise of reasonable care should have known, that the facilities so provided were inadequate, and in an unsafe condition to be used

while the train was in motion or being put into motion, because of the following defects:

1) That the hook was small, and required a person standing on an asphalt tile floor between the seats to reach over a two foot seat to the hook, placed at a distance of approximately five feet above the floor and upon the wall of the car by the window.

2) That the footing provided, as plaintiff is informed and believes, and therefore alleges, is constructed of a composition known as asphalt tile, and was slippery; whereas the aisle of said car was covered by a rug flooring, to provide secure footing.

e) That the Defendant in the exercise of the highest degree of care knew, or should have known that injuries were liable to be sustained by passengers, and particularly this plaintiff, because of the insecure footing provided by the Defendant in its Tour-alux Coaches in those portions thereof covered by a hard surface composition, namely that portion between the seats provided for occupancy of passengers and particularly should have anticipated injuries to passengers standing upon such hard surfaced material when the train lurched, swayed or gave an usual, unexpected or violent jerk.

V.

Plaintiff is informed and believes and therefore alleges, that the defendant company by and through its servant and employee, to wit: the conductor of said train on which the plaintiff was a passenger,

notified its doctor at Spokane, Washington, of the injury to plaintiff, and upon arrival in the City of Spokane, Washington, the said company doctor, whose name is to plaintiff unknown, boarded the train and examined the plaintiff; that upon plaintiff's arrival in the City of Butte, Montana, she was taken by ambulance from the train to St. James Hospital in said City, on the 27th day of August, 1947, where she was continuously confined, due to the injuries hereinafter set forth, until the 26th day of November, 1947; that she was attended by her family physician immediately upon her arrival at said hospital, and has been continuously under his care and treatment from the aforesaid 27th day of August, 1947, to the present time, and will continue to require services of the said physician for an indefinite period of time; that plaintiff is informed and believes, and therefore alleges, that she received the following injuries as a proximate result of negligent acts and omissions of the servants and employees of the defendant company as hereinabove alleged, to wit:

a) Ruptured right kidney accompanied by blood in urine with urinary retention.

b) Partial paralysis of both legs.

c) Tumor-like mass in lower abdomen extending from the illium on the right side to about two inches past the mid-line extending up about mid-way between the pubes and the umbilicus.

d) Shock, which persisted and continued for over two weeks after the injury.

e) Severe pain in back and lower right abdomen.

f) Severe headaches which have continued to the present time.

g) Noticeable swelling over parotid gland on left side of face.

h) An infection of the pelvis of the kidney.

j) A calcification in the pelvis of the right kidney resulting in a kidney stone of large size.

That by reason of the aforesaid injuries plaintiff has been bedridden since receiving said injuries, and because of infection which accompanied the injury to the kidney plaintiff repeatedly runs a temperature.

That on the 13th day of April, 1948, plaintiff was required to return to the St. James Hospital where she remained until the 29th day of April, 1948, at which time she suffered a slight cerebral embolus as a traumatic hemoragic nephritis, and was unconscious for approximately seventy-two hours; that said recurrence and hospitalization between the 13th day of April, 1948, and the twenty-ninth day of April, 1948, were a direct and proximate cause of the injuries heretofore alleged, and received on the 26th day of August, 1947, while a passenger on defendant's train.

That plaintiff is informed and believes and therefore alleges, that the aforesaid injuries are permanent in nature.

That as a direct and proximate result of the aforesaid injuries plaintiff was required to pay for hospitalization and nursing care the sum of approximately \$3000.00, and will be required to pay for the services of her physician the sum of \$1500.00.

VI.

That prior to receiving the aforesaid injuries the plaintiff was an able-bodied woman, in good health in mind and body, and of the age of seventy-five years; that since receiving said injuries the plaintiff has suffered great physical and mental pain, and will continue to suffer great physical and mental pain for some time to come, to plaintiff's damage in the sum of \$50,000.00.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$50,000.00 general damages, and for the sum of \$3500.00 special damages, and for her costs of suit herein expended.

/s/ McCaffery & McCaffery,
SMITHMOORE P. MYERS,
Attorneys for Plaintiff.

DEMAND FOR JURY TRIAL

Demand is hereby made for trial by jury herein.

McCaffery & McCaffery,
SMITHMOORE P. MYERS,
Attorneys for Plaintiff.

[Endorsed]: Filed August 28, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant, and for its Answer to the Plaintiff's Complaint admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I.

II.

Admits the allegations of Paragraph II.

III.

Answering Paragraph III, the Defendant admits that on the 26th day of August, 1947, the Plaintiff, accompanied by her daughter, Margaret, boarded the Eastbound Hiawatha train of the Defendant as a passenger for hire, and was at said time the owner of a ticket entitling her to passage to the City of Butte, Montana, and that she had in addition thereto purchased from the Defendant a sleeping car ticket entitling her and her daughter to the occupancy of Section 12 of Car A-16 Touralux; the Defendant also admits that the Plaintiff and her daughter boarded the said train at the City of Seattle, Washington, on or about the hour of 2:45 p.m. on the 26th day of August, 1947, and presented their tickets to the employees acting for the Defendant in charge of said car. The Defendant further admits that the Hiawatha train is advertised by the De-

fendant and known by the public as a "Streamliner" train offering excellent accommodations for speed and comfort to its passengers. The Defendant denies all of the allegations of Paragraph III not herein specifically admitted.

IV.

Answering Paragraph IV, the Defendant admits that at the back of the seat in Section 12 where the Plaintiff was riding there was placed a short hook toward the top of the panel for the purpose of enabling wearing apparel to be hung there, and that to do so it was necessary for the person hanging it to lean over the seat itself; the Defendant admits that the car in which the Plaintiff was riding was equipped with a public address system; admits that the Plaintiff at that time was of the age of seventy-five (75) years or upwards, and needed assistance in order to move about in the train; the Defendant further admits that while the train was moving the Plaintiff was moving about in the Section where her seat was, and that she fell therein, as a result of which fall she received some injury. The Defendant denies all of the allegations of Paragraph IV not herein specifically admitted.

V.

Answering Paragraph V, the Defendant admits that at the request of the Plaintiff or her daughter, it called a physician to come to the train at Spokane, Washington, in order to examine the Plaintiff, and

that he did so, after which the Plaintiff continued on said train to her destination at Butte, Montana. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph V, and therefore denies the same.

VI.

Defendant denies the allegations of Paragraph VI, and all of the allegations of the Plaintiff's Complaint not herein specifically admitted or denied.

And for Its Affirmative Defense to the Plaintiff's Complaint, the Defendant Alleges:

I.

That the Car A-16 Touralux in which the Plaintiff was riding is a car of new and modern design, and was in clean and satisfactory condition for occupancy by the Plaintiff. That at the side of each seat, and within easy reach of a person sitting in the seat is a push button by means of which a bell signal can be sounded to call the porter on the car for any desired service or request. That on this car A-16 there was a porter assigned, among whose duties it was to render personal services with respect to clothing and baggage requested by passengers, and to respond to signals given by the bell system above referred to. The Defendant further alleges that upon information and belief that the Plaintiff was an experienced traveler on railroad

trains, and selected the Defendant's Hiawatha train for the purpose of having rapid transportation to her destination, and that she knew or in the exercise of reasonable care should have known that the porter was provided on the car for the service of passengers and that the public address system on the train was not used to notify the passengers each time the train stopped and started. The Defendant further alleges that the Plaintiff was an elderly, frail person, for whom it was difficult to move about with safety and security except with the assistance of another person.

II.

That plaintiff saw and realized, or by the exercise of reasonable care should have seen and realized, that the floor surface between the seats in Section 12 was a bare composition floor instead of a carpeted floor. That if said floor rendered the footing insecure for the plaintiff while standing thereon during travel, she knew and realized the same, or by the exercise of reasonable care should have done so, and should not have incurred the risk, if there was a risk, of standing and moving about on such floor without assistance.

That there was no urgency or necessity for the Plaintiff to hang her hat upon the hook by her seat, all as described in Paragraph IV of her Complaint, and that the Plaintiff should have waited to do so until she could obtain assistance, or should have requested someone else to do it for her. The De-

fendant therefore alleges that the Plaintiff negligently and carelessly failed to signal by the bell system which was readily convenient and available to her for the assistance of the porter, or otherwise to request his assistance, on the said Car A-16, and negligently and carelessly failed to wait for him to come and take care of her articles of wearing apparel as she desired, or to wait until her daughter traveling with her could do those things for her. The Defendant further alleges that the Plaintiff was negligent and careless in putting herself in a position of danger from falling or getting herself off balance as a result of normal train movements, which she in the exercise of reasonable care should have anticipated, knowing her own physical limitations and conditions as hereinabove alleged. The Defendant therefore alleges that such injury as the Plaintiff suffered as a result of her fall in said car was directly and proximately caused by her own contributing fault and negligence as herein alleged.

Wherefore, having fully answered, the Defendant prays that the Plaintiff take nothing by her Complaint, that the same be dismissed, and that the Defendant have judgment against the Plaintiff for its costs of action herein expended.

MURPHY, GARLINGTON &
PAULY,

By /s/ J. C. GARLINGTON,

/s/ J. C. GARLINGTON,

Attorneys for Defendant.

[Endorsed]: Filed August 3, 1949.

[Title of District Court and Cause.]

VERDICT

We, the Jury, in the above-entitled cause, find our Verdict in favor of the Plaintiff and against the Defendant, and fix Plaintiff's damages in the amount of Fifteen Thousand Dollars (\$15,000) Dollars.

/s/ JOHN F. FERRY,
Foreman.

[Endorsed]: Filed October 25, 1949.

In the District Court of the United States, District
of Montana, Butte Division

No. 245

MARY ANN HARRINGTON,

Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PA-
CIFIC RAILWAY COMPANY, a corporation,
Defendant.

JUDGMENT

This action came on regularly for trial in the above-entitled Court and before the Honorable W. D. Murray, Judge, on the 19th day of October, 1949: The Plaintiff in said action appeared in person and was represented by her Attorneys, McCaffery &

McCaffery of Butte, Montana, and Smithmoore P. Myers of Seattle, Washington, and the Defendant Corporation was represented by its Counsel, Murphy, Garlington & Pauly of Missoula, Montana. A Jury of twelve (12) persons was duly and regularly impaneled and sworn to try said action. Witnesses on the parts of the Plaintiff and Defendant were sworn and examined, and cause was continued on the 20th and 21st days of October, 1949, and resumed on the 24th day of October, 1949, when after both sides had rested and arguments of counsel had been heard, and instructions of the Court given, the Jury retired to consider of its Verdict and subsequently returned into Court in the morning of the 25th day of October, 1949, and announced to the Court that a Verdict had been reached. That the Verdict of the Jury, omitting the title of Court and cause, is as follows:

Verdict

We, the Jury, in the above-entitled cause, find our Verdict in favor of the Plaintiff and against the Defendant, and fix Plaintiff's damages in the amount of Fifteen Thousand (\$15,000.00) Dollars.

/s/ JOHN F. FERRY.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is Ordered, Adjudged, and Decreed, that said Mary Ann Harrington, Plaintiff, have and recover from the Chicago, Milwaukee, St. Paul & Pacific Railway Company, a corporation, Defendant, the sum of Fifteen Thou-

sand (\$15,000.00) Dollars, together with her costs and disbursements incurred in this action, amounting to the sum of (\$....) Dollars.

Dated this 25th day of October, 1949.

/s/ W. D. MURRAY,
U. S. District Judge.

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby Certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Witness my hand and seal of said Court this 26th day of October, 1949.

[Seal] /s/ H. H. WALKER,
Clerk.

[Endorsed]: Filed October 26, 1949.

[Title of District Court and Cause.]

DEFENDANT'S MOTION
FOR JUDGMENT

Defendant above named hereby moves the Court for an Order setting aside the verdict heretofore returned in favor of the Plaintiff in above entitled cause, and any judgment entered thereon, and entering judgment in favor of the Defendant and against the Plaintiff in accordance with Defendant's Motion for directed verdict made at the conclusion of all the evidence in the case.

MURPHY, GARLINGTON &
PAULY,
/s/ J. C. GARLINGTON,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 1, 1949.

[Title of District Court and Cause.]

ORDER

The defendant's motion to set aside the verdict heretofore returned in favor of the plaintiff, and the judgment entered thereon, and enter judgment in favor of the defendant and against the plaintiff in accordance with defendant's motion for directed verdict made at the conclusion of all of the evidence in the case having been submitted to the Court, and the Court being fully advised in the premises,

It Is Therefore Ordered that the defendant's motion to set aside the verdict and enter judgment in favor of the defendant and against the plaintiff be and the same hereby is denied.

It Is Further Ordered that the Clerk of this court forthwith notify the attorneys of record for the respective parties of the making of this order.

Done and dated this 26th day of November, 1949.

/s/ W. D. MURRAY,

U. S. District Judge.

[Endorsed]: Filed November 26, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeal for the Ninth Circuit from the final judgment entered in this action on the 26th day of October, 1949, in favor of the plaintiff and against the defendant.

Dated this 22nd day of December, 1949.

MURPHY, GARLINGTON &
PAULY.

/s/ J. C. GARLINGTON,

/s/ H. C. PAULY,

Attorneys for Defendant.

[Endorsed]: Filed December 22, 1949.

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF
ORIGINAL EXHIBITS

Upon application of counsel for defendant above named, and it appearing that the following exhibits, to-wit:

Defendant's Exhibit 1

Defendant's Exhibit 1-A

Defendant's Exhibit 1-B

Defendant's Exhibit 1-C

Defendant's Exhibit 1-D

received in the trial of this cause should, by reason of their contents, be sent to the Appellate Court pursuant to Rule 75 (i),

It Is Hereby Ordered, That all such original exhibits be by the Clerk of this Court duly certified to the United States Court of Appeals for the Ninth Circuit, and transmitted to the Clerk of said Court by mail with the Record on Appeal in said cause, said exhibits to be returned to the Clerk of this Court after the final disposition of said appeal, according to the practice of said Clerk of said Circuit Court of Appeals.

Dated This 9th day of January, 1950.

/s/ W. D. MURRAY,

District Judge.

[Endorsed]: Filed January 9, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH DEFENDANT INTENDS TO RELY ON APPEAL.

I.

The Court committed error in refusing to grant the defendant's motion for directed verdict upon one or more of the grounds specified by the defendant in said motion.

II.

The Court committed error in refusing to grant defendant's motion for judgment in its favor and against the plaintiff, setting aside the verdict theretofore returned in favor of the plaintiff in said cause.

III.

The Court committed error in giving the plaintiff's instruction designated No. 30 for each of the reasons specified by the defendant in its exceptions stated at the conclusion of the Court's charge to the jury.

IV.

That the Court committed error in charging the jury that all allegations of contributory negligence on the part of the plaintiff were withdrawn from the consideration of the jury except the question of whether the plaintiff was guilty of contributory negligence in putting herself in a position of danger from falling or getting herself off balance as a result of normal train movements, which she, in the

exercise of reasonable care, should have anticipated, knowing her own physical limitations, for the reason that such charge eliminated from the consideration of the jury other allegations of contributory negligence on the part of the plaintiff which were supported by competent evidence which should have been submitted to the jury for consideration.

MURPHY, GARLINGTON &
PAULY.

/s/ J. C. GARLINGTON,

/s/ H. C. PAULY,

Attorneys for Defendant.

[Endorsed]: Filed December 28, 1949.

In the District Court of the United States, District
of Montana, Butte Division.

No. 245

MARY ANN HARRINGTON,

Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PA-
CIFIC RAILROAD COMPANY, a corpora-
tion,

Defendant.

REPORTER'S TRANSCRIPT

October 19, 1949

Be It Remembered, that this cause came on regu-
larly for trial before the Honorable W. D. Murray,

United States District Judge for the District of Montana, sitting with a jury at Butte, Montana, on the 19th, 20th, 21st and 24th days of October, 1949, Messrs. Joseph J. McCaffery, Sr., Joseph J. McCaffery, Jr., of Butte, Montana, and Smithmoor P. Myers, of Seattle, Washington, appearing as attorneys for the plaintiff, and Messrs. J. C. Garlington and Harry C. Pauly, of Missoula, Montana, appearing as attorneys for the defendant.

Thereupon, the following proceedings were had:

Court: No. 245, Mary Ann Harrington vs. Chicago, Milwaukee, St. Paul and Pacific Railroad. Are the parties ready?

Mr. McCaffery, Jr.: Plaintiff is ready.

Mr. Garlington: Defendant is ready, your Honor.

Court: Very well, call the jury.

* * *

THOMAS FRANCIS NOLAN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Myers:

Q. State your name, please.

A. Thomas Francis Nolan.

Q. Where do you live, Mr. Nolan?

A. Chicago, Illinois.

Q. What is your occupation? [8*]

A. I am a Milwaukee Sleeping Car Conductor.

(Testimony of Thomas Francis Nolan.)

Q. Do you serve on one particular train for the Milwaukee? A. Yes, sir.

Q. And what is that train?

A. The Olympian Hiawatha.

Q. On August 26th, 1947, were you attached to and working on ~~the~~ section of the Olympian Hiawatha which left Seattle, Washington, for the East? A. Yes, sir.

Q. The Hiawatha is the Milwaukee line's streamliner, is it not? A. Yes, sir.

Q. Now, by the term "streamliner," do you mean it offers greater speed and service to the public?

A. No, sir, not necessarily; I don't think I would give that as a description.

Q. What do you mean by the term "streamliner"?

A. To me it means that particular train.

Q. Do you know the comparative speed of the Olympian or the Hiawatha and of the Milwaukee's Olympian between Seattle, Washington, and Butte?

A. No, sir.

Q. Do you know the difference between the times of the Hiawatha and the Olympian between Seattle and Butte, Montana?

A. What do you mean by times?

Q. Elapsed time from leaving Seattle until arriving at Butte, [9] Montana?

A. No, sir, I couldn't answer that.

Q. Do you know if the Hiawatha is considered a faster train than the others?

(Testimony of Thomas Francis Nolan.)

A. I will have to ask you to clarify your question. By "fast" what do you mean?

Q. That its schedule gets it from Seattle to any intermediate point, specifically, Butte, Montana, in less time than the schedule allowed for the Olympian?

A. I believe it makes better time. May I ask you, did you say from Seattle to——

Q. Butte.

A. I believe it does.

Q. On August 26, 1947, were you serving on the car of the Hiawatha which was designated as A-16 Touralux? A. Yes, sir.

Q. Now, for our information and that of the jury, what does the term "Touralux" mean?

A. It is my understanding that "Touralux" is a name that has been applied to that car and similar cars.

Q. It is a particular travel class?

A. I believe it is, sir.

Q. Does that correspond to what is called "Tourist Class" in most trains?

A. That is my understanding, sir. [10]

Q. Is the designation "A-16" a permanent designation for that car? A. No, sir.

Q. It was so designated on that particular day, is that correct? A. Yes, sir.

Q. Do you know which car was designated A-16 on that particular day? A. Yes, sir.

Q. What is the name of that car?

(Testimony of Thomas Francis Nolan.)

A. I cannot tell you the name of the car. I don't know the name of the car.

Q. But you are familiar with the particular car?

A. Yes, sir.

Q. Could you describe that car in any other way or identify it by number or by any other means?

A. That car is described by another number. I couldn't tell you at this time what the number was.

Q. Within a Touralux car, would you give us the approximate location of Section 12 as you stand looking forward in the car?

A. Section 12 is toward the front of the car.

Q. And is it to the right or left of the center as you face forward? A. It is to the left, sir.

Q. To the left. Where would Section 10 be in relation to Section 12?

A. It would be—looking forward in the car it would be immediately behind Section 12.

Q. On the same side of the aisle?

A. Yes, sir.

Q. Where would Section 14 be?

A. Section 14 would be immediately ahead of Section 12.

Q. Section 13?

A. Section 13 would be on the opposite side of the aisle and up one section.

Q. Would it be one section nearer the front than Section 12, then? A. Yes, sir.

Q. Will you describe the seat arrangements within these sections?

(Testimony of Thomas Francis Nolan.)

A. The section has two seats, what we call a forward seat and a backward seat. Both seats are double seats.

Q. And the two seats face each other, do they?

A. Yes, sir.

Q. What is between the sections, what type of partition? A. May I ask you what you mean?

Q. Between Section 12 and Section 14, for example?

A. There is what you might call—I would call it a wall or partition. [12]

Q. This partition extends to the top of the car, does it? A. Yes, sir.

Q. What is the approximate width of these seats from the back to the front?

A. I would say approximately two feet.

Q. They are rather heavily upholstered, are they not? A. They are upholstered.

Q. There is an upholstered back next to the partition? A. Yes, sir.

Q. What is the distance between the two facing seats in a particular section?

A. You mean the outer edge of the seats?

Q. Yes.

Mr. Pauly: May I ask a question for my information? You mean between two seats in the same section or across the aisle?

Q. No, between two seats in the same section.

A. I would say approximately two feet.

Q. What type of flooring or floor covering is

(Testimony of Thomas Francis Nolan.)

used on this space between facing seats in the same section?

A. It is a composition. That is about the only way I could describe it. A composition of some type.

Q. You are not sure of the particular, precise name for it?

A. No, sir, I have never heard it.

Q. What type of flooring or floor covering is used on the [13] aisle of this car?

A. A carpeting, sir.

Q. A carpeting. What facilities for hanging hats and coats exist in each of the sections?

A. Am I to understand you mean before the sections are made down into berths?

Q. Yes, that is correct, when the sections are made up as seats.

A. There are several hooks that are sometimes used for that purpose, and at other times a garment will be placed on a hanger and attached to what I might call a small sort of—not a shelf, it is a little width of wood over the berth. We often times do that, sir.

Q. There are particular hooks within a section, are there not?

A. There are hooks within a section. I won't say they are for the purpose of hanging coats on.

Q. There are, however, hooks on the partition between the sections, is that correct?

(Testimony of Thomas Francis Nolan.)

A. Yes, sir.

Q. On the partition back of each seat there is one hook? A. Yes, sir.

Q. That hook is some distance above the upholstered back of the seat, is that right?

A. Yes, sir. [14]

Q. And is over close to the window?

A. Yes, sir.

Q. Mr. Nolan, are you familiar with the accommodations in the First Class cars on the Hiawatha?

A. Well, I have a vague familiarity with them. I have not worked there.

Q. You do not yourself work there?

A. No, sir.

Q. You have been on occasion through them?

A. I have been through them, sir.

Q. Do you know what type flooring or floor covering is used in the floor space between the two facing seats in one particular section in the First Class cars?

Mr. Garlington: Just a moment. We would like now to make an objection to the answer to this question on the ground that the evidence called for is incompetent, irrelevant and immaterial in that it is apparent it was not a place where the accident occurred, and is offered for the purpose of developing a deficiency in the type of floor covering. We object to that for the reason that such allegations concerning the floor covering do not appear from the complaint to have been the proximate cause of any in-

(Testimòny of Thomas Francis Nolan.)

jury suffered by the plaintiff, and for the further reason that this witness is not qualified to express any statement concerning the comparison of the facilities in the First Class cars, as distinguished from the Touralux [15] cars; for the further reason that any failure on the part of the defendant to provide facilities for taking care of hats and coats could not be in law a foreseeable cause of physical injury to a passenger, particularly when an adequate signal system and porter service is available. In order, your Honor, to shorten the matter and make it unnecessary to repeat this objection, may it be understood that would go to all testimony directed toward this point?

Court: Are you anticipating the Court's ruling?

Mr. Garlington: I want to make our position clear in that respect. Perhaps I am anticipating the Court's ruling, I hadn't thought of that. I am anxious to shorten the matter.

Court: Yes, well, the objection is overruled, and if you are satisfied, counsel, to let the objection stand as to all similar rulings, it is all right with the Court.

Mr. Garlington: As the situation develops, there may be some basis for an additional statement, but in order not to keep interrupting, I thought we might have an understanding.

Court: But so far as the Court is concerned, it may go to similar testimony that is offered. Proceed.

(Testimony of Thomas Francis Nolan.)

(Question read back by reporter as follows:

“Do you know what type flooring or floor covering is used in the floor space between the two facing seats in one particular section in the First Class cars”?)

A. No, sir. [16]

Q. Isn't it true, Mr. Nolan, that rugging or carpeting is used in that location throughout First Class sections?

A. I believe so, but I can't describe them.

Q. You are not sure what type carpeting or rugging is used? A. No, sir.

Q. Returning again to the Touralux accommodations and to the car designated as A-16, what is the approximate width between seats across the aisle?

A. Do I understand you to mean between any two sections or seats directly across from each other?

Q. Opposite sides of the aisle, that is correct.

A. I would say approximately three feet.

Q. The composition flooring between the seats within a section, was that a linoleum type composition?

A. I don't believe it would be described as linoleum type.

Q. Can you describe its appearance for us?

A. It appears to be a hard material; I believe it is blocked off in little squares. Whether those squares are just a diagram, or whether it actually consists of squares, I won't say, I am not sure of

(Testimony of Thomas Francis Nolan.)

that. It is, I would say, a dark gray color. That is about the description I could give you.

Mr. Myers: That is all, Mr. Nolan.

Cross-Examination

By Mr. Pauly:

Q. You have referred to yourself as Sleeping Car Conductor. [17] For our information, will you tell us are there other conductors on the train ordinarily? A. Yes, sir.

Q. What other conductors?

A. Train conductor and Pullman conductor.

Q. As Sleeping Car conductor, what portion of the train do you concern yourself with at all times?

A. With the Touralux sleeping car accommodations.

Q. That is all? A. Yes, sir.

Q. You have nothing to do with the day coaches?

A. No, sir.

Q. You have nothing to do with the club car and observation car? A. No, sir.

Q. You have nothing to do with the dining car?

A. No, sir.

Q. Do you have anything to do with the Pullman section? A. No, sir.

Q. Your duties then are confined merely to the tourist sleeping cars? A. Yes, sir.

Q. How many, ordinarily, are there of such cars on the streamliner?

A. May I ask you if you are referring to ordinarily at that [18] time?

(Testimony of Thomas Francis Nolan.)

Q. Yes. A. Three cars, sir.

Q. What in general do your duties consist of, Mr. Nolan?

A. I supervise those sleeping cars, I lift tickets, that is the berth tickets and transportation tickets. I am charged with seeing that the cars are kept clean and that the service in the cars is satisfactory.

Q. Do you have anything to do with the operation of the train? A. No, sir.

Q. Do any of the conductors you refer to have anything to do with the general supervision of the whole train? A. The train conductor, sir.

Q. Would it be correct to say the Pullman conductor occupies a position corresponding to yours, only he has charge of the Pullman sections or first class sleeping accommodations? A. Yes, sir.

Mr. McCaffery, Jr.: If the Court please, could we have your indulgence for just a minute? (Examining photographs.)

Court: Yes, surely.

Q. (By Mr. Nolan): I hand you some photographs marked Defendant's Exhibit 1-A to 1—and I will give you the last number in a minute, and ask you if those photographs in general depict a section in the Touralux car such as you have described on direct testimony here? [19]

A. Yes, sir.

Q. The last number is Exhibit 1-D.

A. Yes, sir.

Q. Would you be able to tell us, Mr. Nolan,

(Testimony of Thomas Francis Nolan.)

if those pictures are pictures of Section 12 in Car A-16? A. Yes, sir.

Q. Directing your attention to Defendant's Exhibit 1-A, I will ask you if that is a picture showing the aisle in Touralux car A-16? A. It is, sir.

Q. And if Exhibit 1-B is a view of Section 12 in that car? A. Yes, sir.

Q. I have Exhibit 1-A here and ask you if that is a picture of Section 12? A. Yes, sir.

Q. Showing the seats of Section 12 in each of those pictures I last referred to? A. Yes, sir.

Q. And similarly in Exhibit 1-C?

A. Yes, sir.

Q. And Exhibit 1-D being a picture of the upper portion of Section 12 above the seats?

A. That's right, sir.

Mr. Pauly: We would like to offer these pictures in amplification of the testimony. [20]

Mr. Myers: I have one question in connection with them. Not to challenge the pictures, but how do you know these pictures are of Section 12 in Car A-16, Touralux?

A. It is marked in the photographs, the number of the berth shows in the photo.

Mr. Myers: You were not present when the pictures were taken? A. No, sir.

Mr. Myers: By looking at the photographs, you see the designation of the particular section?

A. Yes, sir.

Mr. Myers: There is nothing about this picture

(Testimony of Thomas Francis Nolan.)

or about these pictures which tie them specifically to the car A-16 Touralux, is there? A. No, sir.

Mr. Myers: Is Section 12 on all Touralux cars the same? A. The same in what respect sir?

Mr. Myers: Would it have the same dimensions and same accommodations so that a picture of Section 12 of one car would be a fair representation of Section 12 in any car? A. I believe so.

Mr. Myers: We have no objection.

Court: Very well, admitted without objection.

(At this point Defendant's Exhibits 1, 1-A, 1-B, 1-C and 1-D, being the photographs above identified were admitted in evidence without objection. [21] The same will be certified by the Clerk of this Court to the Court of Appeals.)

Q. In referring to the flooring on this particular car, you have briefly described the flooring as it exists between the seats and in the aisle between the seats. Let me ask you what kind of flooring does the car have at either end?

A. You would mean, I presume, in the aisleways at either end?

Q. Yes.

A. I believe it is the same material, same composition as that which is between the seats in any particular section.

Q. By that do I understand, then, it is of the same composition material?

A. I believe so, sir.

(Testimony of Thomas Francis Nolan.)

Q. And that is in the aisle portion at the end of the car after you leave the seats?

A. Yes, sir.

Q. Let me ask you if, in addition to the seats contained in the car, there are rest rooms or smoking rooms located at either end of the car?

A. Yes, sir.

Q. There is an aisle, is there not, that passes alongside of the smoking room or rest room in each end of the car? A. That's right, sir.

Q. In that aisle or passageway, as it passes the smoking compartments or rest rooms, I take it from your testimony that [22] is covered by the same composition material as used in the section between the seats? A. That is my opinion.

Q. It isn't covered with carpet?

A. No, sir.

Q. What kind of floor covering is there in the smoking rooms, rest rooms, located in each end of the car?

A. It differs, sir, in each one it differs slightly.

Q. What do you mean?

A. We have the Ladies lounge and Men's smoking lounge.

Q. What is in each, if you will describe it to us?

A. The men's smoking lounge in approximately half of the room it has carpeting and on the other half, it has a composition that I believe is similar to that mentioned before, although it is a different color, generally it is a different color. Whether that

(Testimony of Thomas Francis Nolan.)

indicates it is a different composition or not, I wouldn't be in a position to say.

Q. The men's room, then, is divided into two compartments?

A. Not exactly into two compartments. There is a long couch, you might call it, along one side of the room for lounging purposes. It is in front of that we have carpet. Then, there is a partial partition, what you might call a partial partition, coming out from either wall in front of this carpeting. It comes out part way, if you understand what I mean, it doesn't go all the way across, sort of a couple wings, [23] you might describe it.

Q. What is contained in that portion?

A. Back of those so-called wings?

Q. Yes.

A. It is back there where you have benches for lounging purposes and the floor in that section has carpeting.

Q. There is another section in there that you say is partially walled off. What is in that part partially walled off?

A. What I mean to say, this whole thing might be called one room. It has two wings coming out on either side. On one side is the lounge and carpeting, on the other side the wash basins, and off that the men's toilet.

Q. What is the flooring there?

A. It is a composition.

(Testimony of Thomas Francis Nolan.)

Q. What, in the ladies' room, does the flooring consist of?

A. The ladies' room, I believe, is all carpeted.

Q. Including a portion that has wash basins?

A. Yes, sir.

Q. At the end of each car there is a vestibule, is there not, connecting that car with the car behind it?

A. Not in each end of it.

Q. At one end? A. One end.

Q. There is only one vestibule?

A. Yes, sir, only one vestibule on these cars. [24]

Q. What kind of flooring does it have?

A. That has, I believe, sheeting of some kind. I would describe it as steel sheeting or some kind of metal.

Q. Are you familiar with the type flooring that may exist on the day coaches?

A. Not too familiar, sir, I am not sure of it.

Q. Would you be able to tell us whether they are carpeted or whether they consist of composition similar to the composition used in portions of the Touralux car?

A. I can definitely say it isn't carpeted.

Q. But as to whether or not it is composition similar to that in the Touralux car?

A. I don't know. It is composition, but whether it is the same kind, I wouldn't know. If there is any great similarity, I wouldn't know.

Q. The dimensions you gave, Mr. Nolan, being approximate dimensions of the seats and distance

(Testimony of Thomas Francis Nolan.)

between the seats and between the seats across the aisle—let me ask you are those figures that you gave us based on measurements or your own estimation?

A. It was not based on measurements. It is what I might say on my own estimation. I am purely estimating those.

Q. The figures you gave us might then be in error to some extent? A. Quite likely, sir.

Q. Directing your attention to the photograph which is marked “Defendant’s Exhibit 1-C”, and which appears to show one seat in Section 12, I will ask you whether or not it shows any hooks on the walls? A. Yes, sir.

Q. And how many?

A. By the “wall” you are including the whole portion from the back of the seat up to the——

Q. To the ceiling, yes. A. I see two, sir.

Q. Would it be correct to say that one is located near the aisle and at the very top of the car or near the top of the car?

A. Yes, sir, that is correct.

Q. And there is another one which is located somewhat lower and below the berth as it is closed and near the window? A. Yes, sir.

Q. The latter hook appears to be a small hook, the high hook appears to be a larger hook?

A. Yes, sir.

Q. Directing your attention to the small hook that is located on the side nearest the window and below the berth, let me ask you if you know what is that hook generally used for?

(Testimony of Thomas Francis Nolan.)

A. I believe that hook is used to hang the lower berth hammock on. [26]

Q. After the berth is made up?

A. Yes, sir.

Q. After it is made up for occupancy as a bed?

A. Yes, sir.

Q. A hammock of netting is strung between that hook at one end of the section to a similar hook at the opposite end of the section? A. Yes, sir.

Q. What is the other hook generally used for, the larger hook, which is located higher up and near the top of the car, if you know?

A. I am not so sure. I hesitate to answer that because I am not sure.

Q. There are two other hooks similar to the ones shown in Exhibit 1-C located on the opposite wall of the section, are there not?

A. That's right, sir.

Q. And the same is true of each section?

A. Yes, sir.

Mr. Pauly: That is all.

Mr. Myers: No further questions.

(Witness excused.) [27]

MARY ANN HARRINGTON

plaintiff, called as a witness in her own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCaffery, Jr.:

Q. Would you please state your name?

(Testimony of Mary Ann Harrington.)

A. Mary A. Harrington, Mrs. Mary Ann Harrington.

Q. Mrs. Harrington, if you will speak as loudly, or a little louder so that the jury and judge may hear you.

A. Yes, I will.

Q. What is your age, Mrs. Harrington?

A. 77.

Q. What is your birth date?

A. December 10th, I will be 78.

Q. You will be 78 in December? A. Yes.

Q. At the time when you were in Seattle on the 26th day of August, 1947, how old would you have been at that time, Mrs. Harrington?

A. 45, I would be 46 in December.

Q. It would have been 75s?

A. Yes, I was 75.

Q. That is what I mean. Where had you been, Mrs. Harrington, before you came to the City of Seattle?

A. I had been in Marysville, California. I had been down at [28] Salinas, California.

Q. Are your children, some of your children, in California, Mrs. Harrington?

A. Yes, one in Salinas, one in Sacramento and one in San Francisco that died in May.

Q. Did you make the train trip from Marysville to Seattle with your daughter, Marjory?

A. I made it.

Q. Do you recall the time of day, Mrs. Harrington, that you arrived in Seattle, on the 26th of August, 1947?

(Testimony of Mary Ann Harrington.)

A. In the afternoon. We come on the Southern Pacific to Portland, then had to change the trains in Portland to go to Seattle.

Q. Could you recall, Mrs. Harrington, whether or not the train that brought you to Seattle was late, or had it arrived on schedule?

A. I couldn't say.

Q. Could you say, Mrs. Harrington, or could you recall, whether or not you had much time to board the Hiawatha before it departed for Butte? A. No, not much time.

Q. Did you go into the station at Seattle to purchase a ticket?

A. My daughter went in and bought the ticket. We walked up the steps. I sat down in the waiting room. She went in and got the ticket. You see, I went down to Seattle in May and [29] drove down as far as Spokane, and then took the train out of Spokane for Seattle, and I had a married daughter who lived in Seattle. I visited with her until the latter part of June when my daughter came down after school was out. We stayed there awhile before we started for California.

Q. This was your return trip?

A. This was my return trip.

Q. Did you board the Hiawatha car A-16 on that day? A. On that day, yes.

Q. Can you recall whether or not you were assisted in boarding the train by a porter?

A. No, I can't.

(Testimony of Mary Ann Harrington.)

Q. You don't recall?

A. I guess maybe I was, but I can't recall.

Q. When you reached the inside of car A-16, Mrs. Harrington, did anything happen which you can recall as you were going into the train?

A. We had Section 12, and when we got to 12, why a lady and her two children had the section, and my daughter showed the porter, I guess, the tickets we had from California straight through to Butte, and so he went out, and so the conductor, I guess, I don't know who, but anyhow, he came back; and when we went in the first time, see, our Section was 12. He went in 10, which was back, so I sat down on the outside of the seat, you know, and my daughter didn't—she went on after I [30] was seated, she didn't sit down with me, you know. Then, when he came back, he had moved the ladies over in 13 then, so he said we could have our seat, and all I had to do was to get up and slide into the other seat. Then I discovered I was riding backwards on the train, and I wanted—the coats and hats was right opposite me on the other seat that was facing east, and I was, you know, riding backwards. The hat was on top the coats, and I said, "When the train stops, I will pick up my hat, hang it up and get on the seat near the window on the other side," so I got up and I picked up the hat, and I took one step and I reached to put it up. At that point the two trains went together, and I fell back.

(Testimony of Mary Ann Harrington.)

Q. Did your feet slip in any way, Mrs. Harrington?

A. Just with the jerk, they went straight out from under me and I went flat. I don't know how long I was there before the people on the other seat saw me and they picked me up and set me back in the seat. Then the conductor came along and said, "Tickets," and I said, "Well, I haven't got my ticket. I have been hurt, but my daughter has got them." The sleeping car conductor, the two were together, he said, "I picked up her ticket in the aisle or some place." So, they went on and they went out and a man in gray came in with them. He said, "Did any of you people see this lady fall?" They said, "We never saw her fall, but we picked her up." And the little girl, I guess maybe five or around there, I would say—she had two children—she said, "Well, mother, I saw the lady go to put her hat up, and she fell," and she said, "Shh, child, you are too young." So then (interrupted).

Q. Mrs. Harrington (interrupted).

A. In the meantime, this lady went and got my daughter, and she arrived when he was taking my statement. So then I sat there for awhile, and my daughter went and looked for the porter. He wasn't around, I don't know where she found the porter, and she asked him to make up my berth, and she helped me into the dressing room. There was a lounge and I laid down on the lounge until the bed

(Testimony of Mary Ann Harrington.)

was fixed, and she came and got me. I don't know how I was able to take those steps; it must have been the shock. I laid on the bed. She said, "I will undress you." I said, "No, I can't be undressed," I said, "I will just lie here."

Q. Mrs. Harrington, when you were told by the porter that you could move into your own section, did the porter assist you to move from Section 10 to Section 12?

A. He may have taken the suitcase. As I say, I didn't need much assistance, you know, because all I had to do was to just turn around and sit from 10 to 12 on the outside. The little suitcase was on the other side of me and the coats was in front.

Q. He had placed the suitcase on the seat?

A. Yes, a little kit.

Q. You negotiated the change by coming around the section [32] yourself?

A. Yes, just coming around.

Q. You described a fall, Mrs. Harrington. Do you recall in which part of the car you were after you had fallen?

A. Of course. My head went out in the aisle. I couldn't open my mouth the next morning. Then, a few days afterwards, my son said to me, "How did you get that bump up here?" I said, "I don't know."

Q. Mrs. Harrington, I think you said that the train came to a stop before you got up to hang up your hat. is that correct?

(Testimony of Mary Ann Harrington.)

A. Certainly. Sure the train stopped, and then I got up and picked up the hat and took a step. I had my hand up. I don't know whether I could have reached it or not. It was up further, and just then it was like two cars went together, like that. Then my feet went out and I went down.

Q. Mrs. Harrington, how would you describe the jerk?

A. I couldn't describe it in any other way than like it was two cars went together and my feet went out from under me on the slippery floor. There wasn't any carpet there. My head must have struck on carpet. If it hadn't, it would have been split open. I thought I was gone.

Q. Would you say the movement of the train was a sudden movement? A. Certainly.

Q. Did you have any warning of it of any kind?

A. No warning whatever.

Mr. Garlington: Just a minute, objected to, your Honor——

Mr. McCaffery, Jr.: We will withdraw the question.

Q. Mrs. Harrington, do you know whether the train had stopped at a scheduled stop at a station, or where?

A. I don't know anything about it, I couldn't say.

Q. Was Marjory Harrington, your daughter, with you at the time?

A. No, she was down in the dressing room.

(Testimony of Mary Ann Harrington.)

Q. Do you recall or can you recall how long you were out of Seattle when this stop was made?

A. I couldn't say.

Q. Would you say that it was the first stop that was made outside of the station?

A. I think I would. I think I would say it was the first stop because I know I was thinking when it stops, I will set over there near the window and hang up my hat. That was my thought. I wasn't thinking about falling down or any lawsuit, I'll tell you that.

Q. Mrs. Harrington, would you describe the shoes which you were wearing at that time?

A. I have them on now, rubber heels.

Q. Are they what women would understand as a low heel? A. Yes.

Q. They had rubber heels on at the time that this happened? [34]

A. When I bought them.

Q. When you bought them?

A. I never wear any other kind.

Q. Can you describe in any way, Mrs. Harrington, your fall at that time?

A. Well, I can't describe it any more than my two feet went right out when the jerk came from under me. I fell flat on my back. I don't know how long I was lying there, maybe just a few minutes, when people came over and picked me up. They set me where I was sitting, right near the aisle.

(Testimony of Mary Ann Harrington.)

Q. Mrs. Harrington, could you say at this time whether or not you had struck the arm of the seat or any other objects?

A. No, I couldn't say. The only thing I know, I couldn't open my mouth the next morning with my jaw, so I don't know whether it was just the jar or what that did it.

Q. I believe you have stated that some people assisted you and placed you on your seat?

A. Yes, there was a couple of men and this lady. I think the lady took me by the head and shoulders. I don't know how they got me up. I think they called the conductor after this, because he said, "Did any of you see this lady fall?" They said, "No, we didn't see her fall, but we picked her up."

Q. How long would you say it was before any of the employees of the train arrived at your berth?

A. The conductor was the first one, the two conductors. [35]

Q. Did he come in answer to a call?

A. No, he was picking up tickets. He asked for my ticket. I said, "I don't have a ticket," that my daughter had it and that she was down in the train, and I said I had been hurt. He said, "Your ticket?" I said, "I haven't my ticket. I have been hurt. My daughter has my ticket." One of them spoke up and said he had picked up the two tickets.

Q. Did you tell the conductors that you had fallen?

(Testimony of Mary Ann Harrington.)

A. I told them I fell and was hurt and they went out and got a man in gray. I don't know who he was. Three of them were there and they asked people if they saw me fall.

Q. State whether or not they asked you if you needed a doctor or needed any attention?

A. No, not right at that point they didn't. The lady said, "I'll call your daughter." I said, "Maybe I will be all right for a few minutes." I said, "If you know where she is, why get her for me." They got her.

Q. Marjory returned, Marjory being Miss Harrington, your daughter?

A. In the meantime the conductors were there.

Q. Was Marjory there when the man you describe as the man in gray, was she there when he came?

A. Yes, I think she was, I think she just came down.

Q. Did the man in gray ask you any questions?

A. I can't say that he did or not. I was in too much pain. [36]

Q. Do you recall, Mrs. Harrington, whether he asked questions of any people in the car?

A. I don't know. Some of them said, "Did any of you people see this lady fall?" They said, "No, but we picked her up."

Q. Was the porter there at that time, Mrs. Harrington?

A. No, I didn't see the porter at all.

Q. When was the last time you saw the porter?

(Testimony of Mary Ann Harrington.)

A. When I waited by in that seat. He was very busy. I think he ran right down to the (interrupted).

Q. When did you next see the porter, Mrs. Harrington?

A. I don't remember seeing the porter any more.

Q. Did you see him make up your berth?

A. No, I was lying on the sofa in the rest room when he was making up the berth.

Q. Who assisted you to the ladies' rest room?

A. My daughter helped me to the rest room and then she led me back out when the berth was made and I just dropped into it. I didn't take off my clothes, didn't undress until I got in the hospital.

Q. Mrs. Harrington, some of the jury can't hear you. If you would speak a little louder so they could hear. When you were brought back from the ladies' rest room, Mrs. Harrington, did anybody assist you back?

A. My daughter. I just threw myself in the bed and stayed there. [37]

Q. Had the berth been made up?

A. The berth was made up. Then, when I got to Seattle, or to Spokane, the doctor got on the train and he examined my arms and my limbs. He said there wasn't any bones broken. I said, "I am in awful pain." He said, "I will give you something for that." He gave me two pills that knocked me

(Testimony of Mary Ann Harrington.)

out. I went off to sleep and I think I slept nearly until I got into Butte.

Q. Mrs. Harrington (interrupted).

A. I wasn't undressed at all.

Q. You were not undressed at any time?

A. No, I couldn't let them undress me, I was in too much pain.

Q. You remained in that condition until you arrived in the City of Butte?

A. City of Butte. Then they got a wheel chair and my daughter and a young man from Seattle that we knew helped me to get off the train and put me on the wheel chair.

Q. Did the porter or conductor or any railroad employees assist you in leaving the train?

A. No, my daughter and a young man took me off and got me in the wheel chair and wheeled me all the ways up to the depot. Before we got to the depot, the train had pulled out. There was a sister and they had called a taxi for her, so I got in the taxi with her and it went up to the hospital.

Q. Did anybody ask whether there was a doctor on the train, if you know? [38]

A. They asked, yes, Marjory did. They said a doctor would meet the train in Spokane and he did. He was right there when the train stopped in Spokane.

Q. Do you know whether or not that was a doctor for the railroad company?

(Testimony of Mary Ann Harrington.)

A. Yes, that was the railroad doctor, yes.

Q. It was. And did the porter or conductor or anybody inquire concerning your condition from the time that you were talking to them after your fall until the doctor administered those drugs to you in Spokane?

A. No, because I was lying in the berth all the time in pain.

Q. Were you in pain at that time, Mrs. Harrington?

A. I was in pain from the time I fell until—I am really not over all the pain yet.

Q. Mrs. Harrington, you say you were transported from the station in the City of Butte to where? A. City of Butte.

Q. When you arrived in the City of Butte, you had a wheel chair, and you were taken to a taxi?

A. No, I was taken up to the depot, and the taxi, the sister had got into the taxi. She was in the taxi, so she let me get in with her.

Q. Where were you taken from there?

A. To the hospital.

Q. That, I believe, was the 27th day of August, 1947, Mrs. [39] Harrington?

A. Yes, that was the date.

Q. How long were you in the hospital?

A. The day before Thanksgiving. I think that was the 27th day of November, and I had three trained nurses all the time. I was in a coma for 10 days after I got into the hospital. Then, in

(Testimony of Mary Ann Harrington.)

April, I went back to the hospital and I went into a coma again, and I was in there 17 days that time.

Q. That would be April, Mrs. Harrington, of 1948?

A. Yes, that would be about—no, not April, 1948. It would be last April, 1947, wouldn't it? Yes, 1948, pardon me, this is 1949.

Q. You were in there for 17 days?

A. 17 days. Then they took me home and put me to bed again.

Q. From the 27th day of November, 1947, to the 17th day of April, or to the month of April, on whichever date it was, in 1948, describe your activities to the jury with reference to being up and about and able to attend to your household duties.

A. They had to get me from the bed to the chair at first, and I would go back and until I guess it was, probably, let me see, I can't remember exactly.

Q. Would it refresh your recollection, Mrs. Harrington, that you came down for the first time on Easter Sunday?

A. Yes, I came down on Easter Sunday. I came down after dinner. I hadn't come down for dinner. I come down for a half-hour [40] and they took me back upstairs. I could get one foot on the stairs and they would lift the other foot. That is the way I got upstairs and I stayed there until,

(Testimony of Mary Ann Harrington.)

I guess maybe it was June that I would come downstairs with the cane and bannister.

Q. Did you, previous to the time of this accident, Mrs. Harrington, did you have use for a cane?

A. No, never, never.

Q. You stated, I believe, that in the month of June, 1948, you were able to get about with a cane?

A. With a cane I would get down. They would get me out and my daughter would take me in the car and I would go out for a little ride as far as the Five Mile or Nine Mile and then back. To this day, I can't lift a pot of coffee off the stove, so you know how weak I got.

Q. Mrs. Harrington, then, from the time of the occurrence of this accident on the 26th day of August, 1947, until the month of June, 1948, you were absolutely bedridden?

A. Most of the time.

Q. Is that correct? A. Yes.

Q. You stated, I believe, you had trained nurses, three of them a day while you were in the hospital?

A. In the hospital, and just one for four days after I came home. [41]

Q. I didn't hear that, Mrs. Harrington.

A. Then one I just had four days when I came home.

Q. Did you have the assistance of your daughters at home?

A. Always. They had to take care of me. They do yet.

(Testimony of Mary Ann Harrington.)

Q. Mrs. Harrington, then, during the summer of 1948, you were able to get out occasionally?

A. Yes.

Q. Were you able to do any household work?

A. No.

Q. May I ask you, Mrs. Harrington, before this accident occurred, did you do your household work?

A. Helped with it, yes.

Q. You were able to get about?

A. Perfectly. I had very good health, I think, for a woman my age.

Q. You were able to visit your children?

A. Around in Butte?

Q. No around the country?

A. Yes, around the country for years, over 30 years. I travelled back and forth to California, Seattle, and home from California to Butte.

Q. How many children were in the family, Mrs. Harrington?

A. 13. 11 now. One died as a baby and the other boy died in May. (Sobbing.)

Q. Mrs. Harrington——(interrupted) [42]

A. Pardon me, but I couldn't help it.

(Whereupon, at 3:10 P.M., a recess was taken until 3:20 P.M., the same day, at which time the following proceedings were had:)

Mr. McCaffery, Jr.: If the Court please, at this time I would like to withdraw Mrs. Harrington and put Dr. Kane on the stand.

Court: Very well.

P. E. KANE

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCaffery, Jr.:

Q. Please state your name.

A. P. E. Kane.

Q. What is your profession, Doctor?

A. Physician and surgeon.

Q. How long have you been a practicing physician and surgeon in the State of Montana?

A. 31 years.

Q. You were duly licensed at the time you were admitted to practice?

Mr. Pauly: May it please the Court, we will stipulate Dr. Kane is qualified as a doctor to testify.

Mr. McCaffery, Jr.: Thank you. [43]

Court: Very well.

Q. Doctor, are you acquainted with Mary Ann Harrington? A. Yes, sir.

Q. Have you acted as her physician for some-time? A. Yes, sir, I have.

Q. How long would you say that relationship has existed, Doctor?

A. I would say probably 25 years.

Q. Do you recall the 27th day of August, 1947, when Mrs. Harrington was brought to St. James Hospital in the City of Butte, Montana?

A. Yes, sir.

(Testimony of P. E. Kane.)

Q. When did you first see Mrs. Harrington that day?

A. I disremember what time it would be. She came to Butte on the train and was taken directly to the hospital. I don't recall whether it was morning or afternoon to be honest with you.

Q. Was she able to give you any history of injury at the time you first talked to her?

A. Yes. The history I got was she was injured in the train, I believe, in Seattle, in the coach.

Q. Was she conscious at that time, Doctor?

A. Yes, sir.

Q. What diagnosis did you make at the time?

A. On that particular visit, I didn't make any. She was in [44] quite severe pain, complained severely of her back and numbness of both legs. I had in mind a spinal injury there, some injury to the spinal column or cord. Subsequent X-rays, I think taken the following morning, didn't reveal any pathology to the spine or pelvis; and very soon after that, the third or fourth day, she started to pass blood in the urinary bladder.

Q. Would that indicate anything to you as to the nature of the injury?

A. Yes, I came to the conclusion then it was an injury to the kidneys or at least kidney.

Q. Was that diagnosis further demonstrated by physical signs later?

A. Yes, sir.

Q. Would you describe the physical signs that developed later to the jury?

(Testimony of P. E. Kane.)

A. Bleeding was quite profuse. In fact, she got acute retention of urine where she could not urinate herself and had to be catheterized, and with each catheterization, it was almost pure blood. There developed on the fourth or fifth day in the abdomen a mass extending on the right side from the lower kidney region down to the top of the pubic bone, very hard and firm, not only being able to feel it, but you could see it, which, in my opinion, was what we call a retroperitoneal hemorrhage, or bleeding outside of the peritoneum, outside of the bowels, which came from the kidneys. [45]

Q. How long did the condition exist, Doctor?

A. Practically three months while she was in the hospital, and there has been evidence of bleeding from that time on and off from that time to the present.

Q. Doctor, did the tumor or mass which you have described eventually absorb? A. Yes.

Q. That was a physical manifestation of the bleeding in the kidney?

A. And from the outside of the kidney, yes.

Q. Yes. Doctor, how would you describe the injury to the kidney?

A. I have come to the conclusion that Mrs. Harrington suffered a ruptured kidney at the time of the accident.

Q. Has that condition persisted from that time until the present time? A. Yes, it has.

Q. From your treatment of the patient, Mrs.

(Testimony of P. E. Kane.)

Harrington, were you acquainted with her physical condition prior to the time of her injury?

A. Yes, sir, I was.

Q. State whether or not that condition or any condition similar to that existed before you saw her on the 27th day of August, 1947?

A. No, not to my knowledge, it didn't. [46]

Q. What would you say relative to Mrs. Harrington's physical condition before this accident?

A. I would say it was average or normal with the exception of a few colds or things the average person will have.

Q. As you were treating or administering to Mrs. Harrington in the hospital, Doctor, what was her condition with reference to consciousness after the first day or two she was in the hospital?

A. I would say after about the fifth day—her condition grew steadily worse. After about the fifth day she got semi-conscious and irrational, and in fact went into complete unconsciousness and which lasted over a period of 72 hours, and that condition of semi-consciousness and being irrational persisted over a period of 12 or 14 days.

Q. Was it necessary to prescribe trained nurses for her attendance? A. Yes, sir.

Q. How long was it necessary that they be employed, Doctor?

A. I don't know definitely, but as I recall, it seems to me almost the entire time she was in the hospital.

(Testimony of P. E. Kane.)

Q. With respect to an injury of that nature, is that accompanied by pain?

A. Very much so as a rule, yes.

Q. Was it necessary, Doctor, in your treatment of the patient to administer intravenous injections?

A. Yes, she had numerous intravenous injections of salines and glucose and a number of intravenous injections of plasma to replace the lost blood, blood plasma.

Q. How long did that treatment continue, doctor?

A. Practically two months.

Q. Would you say that the patient was in shock for any period?

A. Yes, I would. I would say she was practically in shock for a month, 30 days, approximately.

Q. In your diagnosis, what administrations did you recommend for the relief of pain, Doctor?

A. Well, just the ordinary remedies, opiates, morphine, codeine.

Q. How often would you say you visited her in the hospital from the 27th day of August to the 27th day of November, 1947?

A. I saw her several times a day for the first four to six weeks, and then every day after that at least.

Q. Was there any surgical repair indicated from the injury?

A. In Mrs. Harrington's case, no. So far as surgery, I deemed it out of the question due to her

(Testimony of P. E. Kane.)

physical condition, her age. I would consider it a case of bad judgment to use any surgery.

Q. In a younger person, Doctor, it would have been indicated?

A. It might have been, yes, possibly removal of the kidney.

Q. Doctor, did you make a subsequent examination on yesterday of the kidney? [48]

A. Yes, sir, I did.

Q. Did you find any complications which have arisen?

A. I found calcification in the pelvis of the right kidney on X-ray.

Q. Do you have the X-ray with you, Doctor?

A. Yes, sir.

Q. Doctor, handing you Plaintiff's Exhibit No. 1 for identification, I will ask you what that is?

A. That is an X-ray of the kidney region of Mrs. Mary Harrington.

Q. Was that made under your direction?

A. Yes, sir.

Q. By whom? A. Dr. Joe Kane.

Q. You were present at the time the examination was made and X-ray taken? A. Yes, sir.

Q. Doctor, when was that taken?

A. Yesterday afternoon.

Q. At your offices in the Lewisohn Building?

A. Yes, sir.

Mr. McCaffery, Jr.: We will offer Plaintiff's Exhibit 1 for identification in evidence.

(Testimony of P. E. Kane.)

Mr. Pauly: No objection.

Court: Very well, it is admitted without objection. [49]

(At this point, Plaintiff's Exhibit 1, being X-ray picture of the kidney region of the plaintiff, Mary Ann Harrington, was admitted in evidence without objection. The same will be certified by the Clerk of this Court to the Court of Appeals.)

Q. Doctor, from your X-ray examination, what complication did you find that had resulted from this injury?

A. Calcification filling the pelvis of the right kidney.

Q. Could you explain, Doctor, for the benefit of counsel and the jury how this calcification could arise from the injury?

A. Well, in case of hemorrhage of that type, there is no doubt, and which we see frequently happen in hemorrhages of this type, this certain amount of blood left in the pelvis of that kidney formed what we call an organized clot. It didn't absorb. Day by day it kept getting harder and harder, until what we call calcification, or commonly known as a stone, developed.

Q. Doctor, would you explain to the jury the relation which the kidney has through the pelvis tube to the bladder?

A. Well, it is hard to explain. The kidney it-

(Testimony of P. E. Kane.)

self, the solid substance of the kidney is a specialized organ, the primary function of which is to remove waste products from the blood that circulates in and through the kidney. The kidney is made up of pyramids, shaped like what we call pyramids, where blood flows through and waste products are extracted; and the pelvis of the kidney, as we speak of it, is a sac on the [50] side of the kidney that collects urine after it is extracted from the blood; and from the pelvis in the kidney, there is a small tube about the diameter of an ordinary match that runs from the kidney to the urinary bladder down under the pubes that takes the urine to the bladder. The pelvis of the kidney is sort of a primary reservoir in the kidney itself for the collection of urine.

Q. Then, the urine would pass from the kidney into the pelvis sac and then into the bladder?

A. Down the tube into the bladder, yes.

Q. When the kidney is obstructed in the manner in which you have described Mrs. Harrington's injury, does that make elimination very painful?

A. As a rule, yes, and in her case, I believe a certain amount of blockage existed in that tube, too.

Q. Would you say, Doctor, that Mrs. Harrington had suffered a considerable amount of pain from her condition?

A. Very much so, yes.

Q. Doctor, did you make any diagnosis of headaches or pain in the head?

A. Yes, she did complain quite severely of head-

(Testimony of P. E. Kane.)

aches, and it was a week or ten days after she was admitted to the hospital there was a visible swelling on the side of the face here (indicating), apparently due to striking it, I presume.

Q. Doctor, would you describe that as a swelling of the parotid [51] gland?

A. Yes, parotid gland, yes.

Q. When Mrs. Harrington was released from the hospital on the 27th day of November, 1947, Doctor was she dismissed as cured? A. No.

Q. What recommendations did you have for her care at home?

A. Absolute bed rest as she was having in the hospital. In fact, the pain in her back was so severe she could not help herself. She had to stay in bed.

Q. Would you say her physical condition, Doctor, had been impaired considerably because of her confinement to bed for that period?

A. Yes, I would.

Q. Had she lost considerable weight?

A. Yes.

Q. Nourishment was provided how, Doctor?

A. In the hospital most of it was intravenous. We relied most on glucose, salines and plasma. For a long time she was unable to tolerate solid foods at all, lived mostly on liquids.

Q. Did you visit Mrs. Harrington when she was confined at home? A. Yes, sir.

Q. Do you recall how long a period of time those visits were indicated? [52]

(Testimony of P. E. Kane.)

A. I visited her at home from the time she went home up to April.

Q. Would you say you visited her once a week, once a day, or what?

A. A couple of times a week or better, sometimes three.

Q. That would be in the latter part of 1947 and early part of 1948, up to the month of April?

A. Yes.

Q. In the month of April, did anything occur which required her removal to the hospital?

A. Yes, she had another, as we call it, accute suppression of urine. She couldn't urinate. What we were able to catheterize, we found blood again, quite profuse. At that time, she complained of severe headaches and nausea and vomiting, and I sent her back into the hospital. She was there, I believe, three or four days when she complained of this terrific pain in her head and again lapsed into unconsciousness and was irrational. At that time there was a diagnosis made of a pyelitis, which is an infection present in the pelvis of the kidney, and also she had at that time a cerebral embolus, a clot in the brain.

Q. That condition which was found to exist in April, 1948, Doctor, could you say that was directly caused by the injury which she had received the 27th of August, 1947?

A. In my opinion it was, yes.

Q. What was the physical effect of the embolus?

(Testimony of P. E. Kane.)

A. She was semi-conscious for several days and unable to help herself at all.

Q. Did the embolus manifest itself in the limbs in any way, Doctor?

A. The arms, one arm, I believe the right arm, and the right side of the face.

Q. Did the embolus dissolve subsequently?

A. Apparently so, yes.

Q. For the benefit of the jury, Doctor, would you describe what an embolus is?

A. It is a clot of blood. Frequently it might be vegetation off the heart. It gets loose in the blood stream and lodges some place where it is too small to intervene through the vessel and it cuts off the supply to that particular part of the body.

Q. Where an infection is present in a part of the body, Doctor, such as the pelvis sac, would that indicate that the foreign material had probably come from the situs of the infection?

A. We presume that, yes.

Q. Doctor, from your diagnosis made on the 27th day of August, 1947, and subsequently, would you say that her injuries could have been sustained from the fall which she described having had in the Milwaukee train?

A. Yes, I took that as the cause of it, yes. [54]

Q. Doctor, I believe you have stated that Mrs. Harrington was confined in the hospital for approximately 17 days in April, 1948? A.. Yes.

Q. When she was discharged in April, 1948, what

(Testimony of P. E. Kane.)

was her condition with relation to being in good health, or what was her condition, Doctor?

A. No, she was still confined to bed at home after that.

Q. From your professional care of the patient, Doctor, state what you think her condition was from the 27th of August, 1947, to the month of June, 1948, after she went home from the hospital, with particular reference to whether or not she was bed-ridden and incapable of self care.

A. She was, yes.

Q. Can you describe, Doctor, at what time in your treatment of the patient, from the date of the injury on the 27th day of August, when you first saw her, to the present time, as to whether or not she has returned to a state of health?

A. She has improved. I wouldn't consider her back to normal health yet, no.

Q. When was the first time, Doctor, she was able to get about with any aid of any crutch or cane or other aid?

A. I don't believe she is getting along without a cane as yet that I know of.

Q. I had meant, Doctor, to direct your attention to the first [55] time she was able to even get about with a cane?

A. I don't recall the exact date; I wouldn't be able to state that.

Q. It would be sometime after her second visit to the hospital?

A. Long after that, yes.

(Testimony of P. E. Kane.)

Q. Have you had occasion, Doctor, to visit Mrs. Harrington since she was released from the hospital in April, 1948? A. Oh, yes.

Q. On how many occasions, would you say, by the day or week or month, have you visited her since that time?

A. Probably three or four times a month.

Q. Have you been called to the home of Mrs. Harrington, recently, with a setback that she had, Doctor? A. Yes, on two occasions.

Q. Are you of the opinion at this time that she has recovered from her injuries?

A. No, I am not, I don't think she has fully recovered yet.

Q. Doctor, did you send a bill to the plaintiff for your services? A. No, I didn't.

Q. Would you state what your bill is at the present time for services rendered to Mrs. Harrington during her illness?

A. I think I said sometime ago it is \$1,500.

Q. Would you say that the sum of \$1,500 would be a reasonable [56] sum for the services which you had rendered to Mrs. Harrington over the past two years, as rendered in Silver Bow County, Montana?

A. I think so, yes.

Q. Do you believe at this time your services are at an end? A. Do I what?

Q. Do you believe at this time your services have been completed? A. No, I don't.

Q. You think she will require care in the future?

(Testimony of P. E. Kane.)

A. She has up to the present time, and that is what I am basing my future judgment on.

Q. Doctor, I had forgotten to ask you whether or not your bill has been paid? A. No.

Q. Doctor, I recall you stating that when you first treated Mrs. Harrington in the hospital, at one time in the first five or 10 days, she experienced some paralysis of both limbs? A. Yes.

Q. Did that persist for any length of time, Doctor?

A. As I recall, no. Several days, I would say.

Q. What did that condition indicate with respect to injury?

A. I diagnosed it traumatic neurosis of both legs.

Q. Explain the condition of traumatic neurosis to the jury, Doctor, how would you say it in common ordinary street language? [57]

A. Well, "traumatic", being due to external violence or an injury; and "neurosis", an inflammation of the nerve due to the trauma, and it apparently affected the sciatic nerves of both legs from the back down the leg.

Q. That is an effect which occasionally is experienced where an injury has been received, or a blow?

A. Yes.

Q. Do you recall, Doctor, the length of time that that persisted?

A. Not exactly. I think several days she complained.

Q. Is that considered painful?

(Testimony of P. E. Kane.)

A. In her particular case, the legs, not so much painful as loss of use of them.

Mr. McCaffery, Jr.: You may cross-examine.

Cross-Examination

By Mr. Pauly:

Q. Doctor Kane, I take it from your testimony that your diagnosis of her principal injury was a rupture of the kidney, is that correct?

A. Yes, sir.

Q. Will you explain to us just what constitutes a ruptured kidney?

A. It is a tearing of the capsule of the kidney, that is, the covering of it, and to some extent the kidney itself, the kidney [58] substance.

Q. A rupture could be a breakage or disturbance of any kind in any part of the tissue making up the kidney, could it not, or of the blood supply of the kidney, could it not?

A. Well, I wouldn't say blood supply to the kidney, no.

Q. Or of the blood vessels in the kidney?

A. In the kidney, yes.

Q. Any kind of a leakage or bruising to the kidney or to the blood system of the kidney, would constitute, in your language, a rupture of the kidney, wouldn't it? A. Yes, sir.

Q. The rupture might consist of simply a breakage of one blood vessel, might it not?

A. It might, yes.

(Testimony of P. E. Kane.)

Q. It might be more extensive than that, it might involve the tissue of the kidney itself?

A. Yes, sir.

Q. Do you have any opinion yourself as to what specifically may have been involved here in this particular case?

A. I don't understand, sir.

Q. Do you have any opinion yourself as to what specifically was involved in this particular case?

A. Yes, I have. It seems to me, in my opinion, it must have been a rupture of the perinephrium or functioning part of the kidney. [59]

Q. How do you determine that?

A. From the extravasation of blood and urine she had and the blood and tumor she had in the abdomen, the blood in the urine in large amounts are two ways.

Q. Both conditions could equally, or at least could result equally as well, could they not, Doctor, from simply a rupture of the blood system in the kidney?

A. Yes, but it would have to have, as we call leak out of the kidney, extravasation, in order to get this mass. That would have to be outside of the kidney itself.

Q. That would indicate some puncture, some leak, that would permit a blood mass to form here outside?

A. Yes.

Q. The rupture, then, as I understand it, would still be a case of a loss of some blood of the kidney, which formed a growth or mass outside?

(Testimony of P. E. Kane.)

A. Coming from inside the kidney to the outside tissues, yes.

Q. An X-ray is of no help to you in diagnosing that condition is it, Doctor?

A. Not at that time particularly it wouldn't be, no. That is the X-ray itself. I might qualify that by saying a cystoscopic examination with X-ray would have shown it.

Q. Did you make such examination?

A. No, it was an acute condition, and it is to be avoided if it can, and it wasn't done for that reason, and secondly, she [60] was in such shock, I deemed it unwise to put her to that examination.

Q. Particularly a person of that age?

A. Yes, sir.

Q. Your diagnosis was based on such inferences as you might be able to draw from other signs?

A. Symptoms.

Q. And simply represents your opinion as to what the condition is? A. Yes, sir.

Q. That is not a matter that you or any doctor could assume to speak positively and with finality and without admission of some error?

A. From what Mrs. Harrington's present condition was and what it turned out to be afterwards, I would say yes, I could.

Q. As to the extent of the rupture, that sort of thing, however, doctors might disagree?

A. Yes, that is true, the extent of it.

Q. That would be largely a matter of your opinion of it?

(Testimony of P. E. Kane.)

A. If I understand what you mean right, you mean the extent the kidney might have been torn?

Q. Yes.

A. No, I don't know how that could be determined unless you opened it up and looked at it, there would be no way of doing it.

Q. Did I understand you, in referring to the pelvis, you are [61] speaking of the pelvis of the kidney and not the pelvis bone that most of us think of if we have ever heard of it?

A. No, they are two different structures. The semi-reservoir of the kidney is known as the pelvis of the kidney. It isn't bone, it is tissue.

Q. No injury to the pelvis bone?

A. No, sir, none we could determine.

Q. Did you take any X-rays of Mrs. Harrington at the time of your earliest examination?

A. Yes, X-rays were taken of the whole spinal column and the whole pelvic region.

Q. That for the reason, as I recall you explained, you thought there might be some injury to her back?

A. A spine or spinal cord fractures particularly we were looking for.

Q. Fracture of some bones, perhaps?

A. Yes.

Q. What was the result of those X-rays, Doctor?

A. Negative as regards fractures, no fractures.

Q. No fractures of any bones at all?

A. No.

(Testimony of P. E. Kane.)

Q. So that is not involved in Mrs. Harrington's case? A. No.

Q. The blood in the urine that you referred to, Doctor; I take it, was simply part of the elimination of the blood which [62] escaped from the same rupture, is that true? A. Yes.

Q. Some may have passed through her system with urine and the other collected within her abdomen as part of the blood clot? A. Yes.

Q. I understood you to say that the blood clot had not been fully absorbed?

A. In the abdomen, yes; in the pelvis of the kidney, I would say no, it was not.

Q. In that sac that is attached to the kidney, it is not fully absorbed? A. Yes.

Q. But so far as the portion that previously existed in the abdomen, that has been absorbed?

A. Yes.

Q. That clot, as I understand it, is now a small stone?

A. Yes, as I explained, the clot becomes what we call organized. Then, in the kidney particularly, waste products such as urates, phosphates, solids, are embodied in the normal urine, and they impregnate the clot and it becomes what we call calcified and turns into stone.

Q. It isn't at all uncommon to find kidney stones, is it, Doctor? A. No. [63]

Q. This is the kind of kidney stone generally referred to as a kidney stone, is it not?

(Testimony of P. E. Kane.)

A. Yes, sir.

Q. Stones sometimes occur without any history of injury as you have in this case?

A. In this particular case, the original plates didn't show it. It has occurred since the first plates were taken.

Q. It wasn't present in the first pictures?

A. No.

Q. Is it present now? A. Yes.

Q. Kidney stones do result, however, from functions in a person's body without the necessity of having any injury or rupture such as involved in this case? A. Yes, sir, that is true.

Q. In this particular case, then, Doctor, there is no way you can determine definitely that this particular stone you found here recently is necessarily connected with any blood clot occasioned at the time of this injury?

A. I am basing my opinion on the fact that the stone wasn't there previous to the injury or immediately afterwards. It is considerable size now, and the fact she had a hemorrhage there would lead me to believe it is an organized clot that became calcified.

Q. However, it would be possible for that stone to come from [64] ordinary solids in the waste matter of the kidney without in any way being connected with the blood clot, is that true, Doctor?

A. I suppose it would be possible.

Q. In your case you associate it with the injury

(Testimony of P. E. Kane.)

primarily since it has developed since the accident?

A. And since there was bleeding there, yes.

Q. But it is not impossible, of course, for it to have occurred wholly independent of and without any connection to the injury involved in this case?

A. It is possible.

Q. So far as that little stone is concerned, does it interfere with the functioning of the kidney?

A. Yes, this is large enough I presume it would, yes.

Q. In what way?

A. I think it is beginning to impinge upon the kidney substance itself; it is large enough to do it. It is certainly filling up the pelvis of that kidney to the extent it doesn't hold the amount of urine it should.

Q. Purely a mechanical obstruction?

A. Yes.

Q. It would be comparable, would it not, to having a rock in a bottle, preventing it, in the first place, from holding as much fluid as it would without the rock, and in the second place, it might interfere with the flow of water out of the bottle?

A. Yes.

Q. It is the only effect the kidney stone would have in this case?

A. It might cause some pain, some distress, which they usually do.

Q. In that condition, a kidney stone of this size is not at all uncommon in elderly people, is it?

A. I would certainly say they wouldn't be com-

(Testimony of P. E. Kane.)

mon in elderly people. I haven't seen too many of them.

Q. It isn't average, it isn't normal?

A. No, not normal.

Q. But many people do have kidney stones?

A. Yes.

Q. And that doesn't interfere with ordinary activity? A. Of the kidney?

Q. Yes.

A. Yes, it would. That kidney doesn't function as well as the other one.

Q. People do get along all right with stones?

A. Yes.

Q. There is no treatment that can be given to stones?

A. Surgical removal is the treatment.

Q. That is the only treatment? A. Yes.

Q. In this case, no surgery was advisable because of her age? [66] A. No, sir, that is true.

Q. Now, Doctor, accepting your judgment as to the kind of injury that had occurred to her kidney, bearing in mind Mrs. Harrington's general condition as you knew it before and the state of her age and all, that sort of injury would not be at all unexpected to you as a Doctor from any ordinary fall, isn't that true?

A. That it wouldn't be unexpected from an ordinary fall?

Q. Yes. A. Yes, it would.

Q. Well, Doctor, of course, everyone recognizes

(Testimony of P. E. Kane.)

that a fall, any kind of a fall, by an older person is a more hazardous matter than a fall by a younger person, isn't that true? A. True.

Q. It is true, is it not, Doctor, that that is because of the fact that they are more subject to injury, are they not?

A. Yes, I would say that their tolerance for injury probably is low. You might put it that way.

Q. Of course, the principal fear that most people have to a fall, or elderly people falling, is danger of breaking bones? A. Yes.

Q. But any fall of a person of her age could result in the bruising of tissue in the surface and interior, could it not? A. Yes.

Q. That is actually what happened here, was a bruising of the [67] tissue of the kidney?

A. No, it was a tearing of it more than a bruising, a rupturing.

Q. That would not be a surprising consequence of a fall?

A. It would be to me, yes, because we don't see ruptured kidneys very often from any type of injury.

Q. In this case, you believe it resulted from the fall? A. Yes.

Court: Then, the fall was more than just an ordinary fall?

A. In my opinion, it would be, Judge, yes. I would consider for a ruptured kidney, it would have to have been a severe fall.

(Testimony of P. E. Kane.)

Q. Well, Doctor, it might also reflect what sort of object she might have struck in the process of falling, too, isn't that true?

A. I don't know in Mrs. Harrington's case that I could answer that question. In my mind, I doubt very much if that kidney were struck. It may have been. I can't prove or disprove that, only from the history, and, as in all accident cases, the patient was very vague. All we know, she hit with force that hurt her back considerably. Whether she struck the kidney proper, or whether it was due to just the force of striking on her back that ruptured the kidney, I am unable to state. I would say it was a severe fall that did it. I would say it would have to be a severe fall to rupture a kidney. [68]

Q. A severe fall, or probably striking some object in the process of falling?

A. Or a severe blow in that region.

Q. Or a combination of both? A. Yes.

Q. Her recovery from the time you first dismissed her from the hospital around Thanksgiving of 1947, until her return in April, 1948, was generally satisfactory to you, was it not, Doctor?

A. No, I would say that her recovery was anything but pleasing to me. She was in bed, was in bed all that time. She had frequent upsets of the stomach, and frequent kick-ups in the urinary system, pain on urination, blood in the urine. There was some of that. It was good one day, bad the next. Progress wasn't satisfactory at all.

(Testimony of P. E. Kane.)

Q. Of course, in a person of her age, you would expect the recovery would be slower? A. Yes.

Q. What was the reason primarily for her return to the hospital in April, 1948?

A. The primary reason was she was passing large amounts of blood in the urine, vomiting, not being able to retain any solids or liquids whatever, headaches, pain in the back which she was complaining of having. I was more concerned with her nutritional welfare, that is, where she was vomiting, not [69] retaining liquids and losing large amounts of blood.

Q. What about the cerebral embolus you stated she had?

A. She had that three or four days after, in the hospital.

Q. An embolus you described as being a stoppage of the blood supply?

A. It is a clot in the artery to some particular part of the body, brain, lung, finger. It is——(interrupted).

Q. A mechanical obstruction? A. Yes.

Q. And again, what might be the source of that obstruction is merely a matter of opinion, is it not?

A. We base that on the tissue injured, where very frequently is found the embolus site, for instance a varicose vein or a bruise on the arm. This particular case, I took it it was from the kidney.

Q. Because of the injury to the kidney?

A. Yes, and the blood in the urine.

(Testimony of P. E. Kane.)

Q. That sort of cerebral condition can also result from a constriction in the blood vessel itself without any foreign object stopping it?

A. Not in the brain, I doubt that very much. We have a condition, which is open to argument, in the heart, or what they call coronary thrombosis where there may be and can be a constriction of the coronary vessels in the heart that would give the same symptoms as a clot, but in the brain that would not be [70] true. You have not the muscular structures present in the brain that you do in the other, the body of the heart.

Q. You do have cases of stoppages of blood in the brain such as this where there is no accompanying case of injured organs involved?

A. We frequently get them from what I term vegetation clots from the heart, what is commonly known as leakage of the heart. They sometimes will let go and get in the blood stream of the head, brain and heart too.

Q. Is that sort of condition, Doctor, the same as that what we generally refer to as a stroke?

A. Yes, with the exception of the explanation of the mechanics of it. A stroke, primarily, in nine cases out of ten, is due to a rupture of the blood vessel due to hypertension or high blood pressure. In other words, the vessel just blows out. It can't stand the pressure. The physical signs of a stroke or emboli or vegetation clot from the heart, they likewise can be the same.

(Testimony of P. E. Kane.)

Q. In any event, it is simply a matter of interference of circulation or supply? A. Yes, sir.

Q. It may be the result of a blowing up of a blood vessel, or in either case, an obstruction of the blood vessel, either coming from an injured part, or a part that is in no way involved in an injury?

A. Yes, sir.

Q. I realize in this case because of the fact she had the kidney condition you found to exist, with that condition, you attributed the kidney as being the source of that stoppage? A. Yes, sir.

Q. But there again you have no way of determining positively it was due to that and not something else?

A. Medicine is nothing but good detective work. You rule out each and every other possibility, and you come to the conclusion. In Mrs. Harrington's case, I found no reason to blame it on anything else but that.

Q. I realize that, but at the same time, you, as a good doctor, would have to admit your opinion could be wrong and it could have been attributed to some other fact? A. Yes, sir.

Q. There is no way of proving it?

A. No, sir.

Q. And your opinion is as good as anybody else's? A. Yes.

Q. In any event, Doctor, whatever numbness there might have been involved in connection with that condition of the right arm and face which

(Testimony of P. E. Kane.)

would indicate an involvement of some part of the brain, that condition has cleared up and been corrected, has it not? A. Yes. [72]

Q. So that whatever cerebral embolism may have existed, it wasn't a matter of any particular concern or lasting consequence? A. No, it is cleared.

Mr. Pauly: That is all.

Redirect Examination

By Mr. McCaffrey, Jr.:

Q. Doctor, with reference to the calcification found in the pelvis of the kidney, you stated, I believe, that condition did not exist when you first made your examination in August, 1947?

A. Yes, sir.

Q. However, you did find the stone and calcification to exist on yesterday, the 18th, or 19th day of October, 1949. Is there any way, Doctor, that you can describe the size of the stone at this time? Is it a large stone or small.

A. I would describe it as large, but it is hard to describe, it is irregular. In designating size of stones in kidneys, I would say it is large, yes.

Q. Would you say, Doctor, that if a person of Mrs. Harrington's age were to have been susceptible to a kidney stone prior in her life, that it would have developed at the age of 75, before her accident?

A. I couldn't answer that. It is possible, I suppose. [73]

Q. Is there any way to determine, Doctor, the growth of a kidney stone in any elapsed period of time?

(Testimony of P. E. Kane.)

A. No, there isn't, I wouldn't know of any. Some may form slow, some may form fast, but I don't know of any way you could calculate that.

Q. You said in answer to a question by Mr. Pauly that the condition in the kidney could have—it was possible for that condition to have developed without injury, or did I misinterpret your statement?

A. I think what Mr. Pauly referred to was that the stone could or does form without injury. I think I answer that as yes, they do.

Q. Did you, at any time, diagnose Mrs. Harrington's illness as serious, Doctor?

A. Yes, a week after she was in the hospital, I frankly didn't think she would live.

Q. Did you despair of her life on any occasion or any number of occasions? A. Yes.

Q. How many occasions?

A. On three different occasions I recall distinctly I told the family.

Mr. McCaffery, Jr.: That is all.

Mr. Pauly: That is all.

Court: Tell me this, what is the effect of the stone in [74] the kidney on the physical well being of the person?

A. The first effect is of an impediment to the free flow of urine into that pelvis. The second effect—and then physical pain accompanies that lots of times. Then, the second effect and most dangerous is that the stone will continue growing or accumu-

(Testimony of P. E. Kane.)

lating more calcium in the kidney until it fills the kidney itself and goes so far it will destroy a kidney if not removed.

Mr. McCaffery, Jr.: May I ask the Doctor a question I should have asked on direct examination, please?

Court: Very well.

Q. (By Mr. McCaffery, Jr.): Doctor, handing you Plaintiff's Exhibit 2 for identification, I will ask you to examine the exhibit, which is a bill from the St. James Hospital for services rendered to Mary Harrington on the 27th day of August, 1947, for her first confinement. Have you examined, the Exhibit, Doctor? A. Yes, sir.

Q. I will ask you whether the sum of \$1018.80 is a reasonable sum for the services rendered as indicated on the bill to Mrs. Harrington from the 27th day of August, 1947, to the 26th day of November, 1947?

A. I am not familiar with their room rates down there, but the laboratory, X-ray and other services, I would say yes, it is very reasonable. [75]

Q. Would you say, Doctor, that those are sums usually charged for such care?

A. I don't know, I presume they are.

Q. Handing you Plaintiff's Exhibit 2-A, which is the bill from St. James Hospital for confinement from the 13th of April, 1948, to the 29th day of April, 1948, is that a reasonable charge for the services rendered?

(Testimony of P. E. Kane.)

A. Just being familiar with what work we do in the laboratory, what orders we may leave, the necessary use of oxygen or drugs is all I am familiar with, I would say yes, it is reasonable.

Q. Yes. Then, as to items other than room rent, may the testimony of the Doctor go as to those being reasonable charges in Silver Bow County, Montana?

Court: Yes.

Mr. McCaffery, Jr.: That is all.

Court: Any further questions, Mr. Pauly?

Mr. Pauly: No, your Honor.

(Witness excused.)

MARY ANN HARRINGTON

plaintiff, recalled as a witness on her own behalf, having previously been sworn, testified as follows:

Direct Examination

(Continued)

By Mr. McCaffery, Jr.:

Q. Mrs. Harrington, do you recall going to St. James Hospital [76] when you arrived in the City of Butte? A. That's right, I recall it.

Q. Do you remember the first doctor you met there? A. Dr. Joe Kane going in the door.

Q. Dr. Joe Kane? A. Going in the door.

Q. Yes, were you admitted to a room in the hospital immediately, Mrs. Harrington?

A. I don't remember.

Q. You don't remember?

(Testimony of Mary Ann Harrington.)

A. I don't think I was, I think they had to, you know, take my name, find out about me, I guess, first. I can't recall very much about it.

Q. Have you had any occasion, Mrs. Harrington, to despair of regaining your health?

A. No, I have been pretty brave about it. I am always hoping I will.

Q. Have you had any doubts in your mind about it?

A. I might have had at first, I don't know.

Q. Did you at any time ask any of the children what their ideas were? A. No, I didn't.

Q. You don't remember asking Jerry?

A. No.

Q. Mrs. Harrington, in June of last year you said you felt [77] better and you were able to get out during the summer time? A. Yes.

Q. When were you again confined to your home without being able to get out? A. This year.

Q. That would be last year in September or October, or the fall of last year, was it?

A. No, sir, I wasn't able to get out. I was able to be around the house, but I didn't feel very good.

Q. Did you get out again this summer, Mrs. Harrington? A. Yes, I got out this summer.

Q. Have you been able?

A. I have been able to be helped in the car and get over to church in the side door and out into the car again. That is about the extent of my amusement.

(Testimony of Mary Ann Harrington.)

Q. Mrs. Harrington, state whether or not the fall which you experienced in the railroad car was a severe, hard fall, or was it just an easy fall?

A. Oh, my, it was a terrible fall, I thought. I said, "I am done for".

Q. Did that come from a slight movement of the car, or was it a violent movement, or what was it, Mrs. Harrington?

A. It was a very violent jerk. As I said, it was just like two cars went together, like that. My feet went out from under me and I fell flat, my head striking out towards the aisle. [78]

Q. Can you state, Mrs. Harrington, whether your head was in the aisle and part of your body, or was it just your head, or what?

A. I can't state it. I am sure my head must have struck the rug or it would have been cut open with the fall the way I felt. The people that picked me up, they should know how far I was, you know.

Q. Mrs. Harrington, handing you Plaintiff's Exhibit 2 and 2-A, these are the bills for your hospital and doctor bills, Mrs. Harrington, at the St. James Hospital. You know that the sum of \$1,018.80 was paid for you?

A. Yes, my daughter paid it. I couldn't write any checks.

Q. You couldn't do anything yourself?

A. Yes.

Q. That was for your account, however?

(Testimony of Mary Ann Harrington.)

A. Yes.

Q. You know the sum of \$196.35 was paid for that second trip for you? A. Yes.

Q. State whether or not you were in Section 12 before the train left Seattle.

A. No, I am confused about that. I couldn't swear to that, although I think I thought I was at the time, but I can't swear to it now that I was seated when the train, before it started. I don't think I could have been. [79]

Q. You don't think you could have been?

A. I don't think I could have been because I think I would have hung up the hat and coat where I was sitting if I was in the train, I mean in my right seat. I never got in the right seat.

Q. Mrs. Harrington, how do you feel at the present time?

A. Oh, I feel pretty good, very weak. My strength is returning very slowly, but I think I am pretty good considering what I have gone through.

Q. Do you still experience the headaches, Mrs. Harrington? A. Off and on.

Q. Have you been required to take innumerable pills and other medicine?

A. Well, about two or three weeks ago I took some pills. I was upset and didn't feel good and had pains all over me.

Q. Did you, at any time, Mrs. Harrington, decide you weren't going to take any more pills?

A. Yes, I have thought I took enough of them,

(Testimony of Mary Ann Harrington.)

although I think what I took of them did me good. I know they eased the pain in my back.

Q. Mrs. Harrington, have you travelled considerably in your lifetime on trains?

A. For the last 42 or 43 years, I have, between California and Montana.

Q. Have you ever experienced in your travels a jerk like the [80] one which you experienced on this train?

A. I couldn't say that I did. I have often noticed jerks in the train, but I was never standing up on one.

Mr. McCaffery, Jr.: I think that is all. You may examine.

Cross-Examination

By Mr. Pauly:

Q. Mrs. Harrington, previous to this accident you testified that you went to Seattle and to California almost every year? A. Yes.

Q. To visit your children?

A. Yes, sometimes by automobile and sometimes by train.

Q. Sometimes by Milwaukee train?

A. Yes, as far as Seattle.

Q. You were accustomed to train travel, then, were you not? A. Very much so.

Q. Riding on trains was no novelty to you?

A. No.

Q. You had never been on this particular Milwaukee train before, had you?

(Testimony of Mary Ann Harrington.)

A. No, because I drove down in May by automobile.

Q. I didn't hear you.

A. I say I drove down by automobile in May to Spokane.

Q. Who was with you driving to Spokane? [81]

A. Why, my son-in-law, Mr. Roach and my niece, Miss Roach.

Q. And from there?

A. He drove as far as Spokane and we took the train out in the morning and it was a Great Northern train. There was no other train to take in the morning. We didn't want to wait over until night.

Q. On previous trips you had returned from Seattle to Butte on some occasions using the Milwaukee train?

A. Yes, sir.

Q. In this particular case, as I understand it, you were coming back from Marysville, California?

A. From Marysville, California.

Q. You had to make a change in Seattle?

A. We did. They don't have a regular train coming up to Portland from Marysville. You have to take a train that comes from San Francisco. It stops at Marysville and takes you up to Gerber to get on the regular train. On that train we had standard tickets, but we couldn't get a standard ticket out of Seattle unless we waited longer.

Q. You had a Pullman up to Seattle?

A. Up to Seattle.

Q. You couldn't get one out of Seattle?

(Testimony of Mary Ann Harrington.)

A. My daughter got tickets all the way through from Seattle to Marysville and to Butte, but on the standard only as far as Portland. [82]

Q. So I get this straight, your daughter in Marysville got your sleeper——(interrupted)

A. No, this daughter here.

Q. Yes. While in Marysville she got a sleeper ticket clear from Marysville to Seattle and from Seattle on to Butte?

A. On to Butte, yes. She has the tickets there with her.

Q. You had a Pullman ticket from Marysville to Seattle and a tourist sleeper accommodation from Seattle to Butte? A. From Seattle to Butte.

Q. Now, your daughter also had her transportation ticket clear through from Marysville to Butte, didn't she?

A. The transportation from Butte, wasn't it? You see, she bought her tickets in Butte, and bought mine from Seattle, a round trip to California and then back to Seattle. Then, when we got back to Seattle, she had her ticket to Butte, but I had to buy my ticket from Seattle to Butte, but she had hers, and we had a section.

Q. All right. On arriving in Seattle, your daughter had her own transportation from Seattle to Butte. She also had sleeper accommodations for the two of you? A. Yes.

Q. In Section 12? A. Yes, Section 12.

Q. Car A-16? A. Yes. [83]

(Testimony of Mary Ann Harrington.)

Q. But didn't have your transportation ticket from Seattle to Butte. She had to pick that up in Seattle? A. Yes.

Q. Going back to what I started with, the train you came into Seattle on from Portland stopped and ended its run there at Seattle, did it not?

A. Yes.

Q. You had to get off that train and get on the Milwaukee train? A. Yes.

Q. Did both those trains use the same station in Seattle?

A. I don't know, but I know I walked up the steps to the waiting room when she went in to get my tickets, you know, then I walked back on down.

Q. You did not leave that station?

A. No.

Q. You got on the Milwaukee train at the same station? A. At the same station.

Q. Do you know how much time elapsed between the time you arrived on the train from Marysville and the time your Milwaukee train left, approximately how much time elapsed, do you know?

A. I didn't pay any attention, but it wasn't very long. You mean from Marysville?

Q. I just mean how long in the station at Seattle, 15 or 20 [84] minutes?

A. Just long enough to get the ticket.

Q. What luggage did you have with you at that time, do you know?

(Testimony of Mary Ann Harrington.)

A. We just had, we just took one suitcase and a little kit case for ourselves, a small suitcase.

Q. That is all you had with you to take on the Milwaukee train? A. Yes.

Q. Did you have any other bags you checked?

A. We checked through.

Q. You had other bags?

A. We checked other bags through from California.

Q. You didn't have to bother with them from Seattle?

A. I don't know whether we checked some from Seattle, I am not sure of that. I didn't have anything to do with that.

Q. But in any event, the only bags you had to take with you on the Milwaukee train was one suitcase and a small overnight case? A. Yes.

Q. You had coats with you? A. Yes.

Q. Did you have a red cap at the station to help you with the luggage and coats?

A. No. [85]

Q. Who carried your luggage?

A. I believe the porter took the suitcase himself for carrying it on down. I guess he carried it in. I am confused about it. I said we had no porter, but then I would guess we did because I wasn't carrying any baggage myself.

Q. Regarding your boarding the train, Mrs. Harrington, was the porter present in the train when you got on, do you know?

(Testimony of Mary Ann Harrington.)

A. Yes, I think he must have taken the suitcase when we got on.

Q. You think he took your suitcase and took you on the train?

A. I mean when we got on the steps. You mean getting on the train?

Q. Yes.

A. As far as I can remember, he was ahead.

Q. The porter was there? A. Yes.

Q. And he helped you on the train?

A. I suppose he did. He had the stool there, you know. I am confused about that. I might have walked up on it.

Q. Did he show you to your space?

A. Yes and the lady and two children had the space.

Q. That was in Section 12?

A. In Section 12.

Q. The porter was with you at that time?

A. Yes, because my daughter showed him we had tickets through [86] from California, so he went out, and I don't know who he saw, but he came back and told us he had moved the lady in the meantime and her children over to 13 across the aisle.

Q. Before we get into that, when you first arrived at Section 12, there was a lady and two children sitting in it? A. Yes.

Q. Did they get out of there immediately?

A. No, they didn't get out of there until the

(Testimony of Mary Ann Harrington.)

porter got our tickets. He went out and saw the conductor there, I guess.

Q. Where did you sit then?

A. Right in 10, right back of 12.

Q. You recall definitely that was Section 10?

A. Yes, the seat right near the aisle. All I had to do when he said we could have our section was to just get up from the seat and get into the other right there.

Q. There was nobody sitting in Section 10?

A. No, not at that time.

Q. You sat on the seat in Section 10 which was nearest to Section 12? A. Yes, 12.

Q. What was done with your bags at that time, do you know?

A. I don't know whether he slipped the bag under 12 when he went out or not, but the little one was on the seat next to me.

Q. You don't know what happened to the big bag?

A. No, I don't know whether he dropped it there when he looked [87] to see about the tickets or not.

Q. You don't know whether the big bag was put in Section 10 along with you?

A. I can't remember that part.

Q. You don't have any recollection as to what happened to the bag?

A. I just didn't pay any attention.

Q. Were the coats put in Section 10 with you?

(Testimony of Mary Ann Harrington.)

A. Yes, the coats were in Section 10 right on the seat.

Q. Was your daughter with you at that time?

A. Until I sat down, yes, then she went on. She didn't sit down at all.

Q. Had the train left Seattle then?

A. I think the train must have left Seattle. I didn't think it did, but I am sure it must have left Seattle.

Q. The porter hadn't come back yet?

A. He came back when he said we could have our seats, and then he went right on again.

Q. Let's just back up again. I am confused myself as to what the facts are. As I get it, you and your daughter got on the train with the porter?

A. Yes.

Q. You went down the aisle to Section 12?

A. Yes.

Q. There was a lady and two children there in your seat, so [88] that you sat in Section 10?

A. Yes.

Q. You don't know what happened to your bag, but the overnight case and your coats were left there in Section 10 with you and the porter then left. Now, did your daughter then leave?

A. My daughter left, yes.

Q. While you were sitting in Section 10?

A. No, no, after I had moved into Section 12.

Q. Then before your daughter left, did the porter come back? A. No.

(Testimony of Mary Ann Harrington.)

Q. How did you get into Section 12, then?

A. He came back to Section 10 and told us we could have that, he had moved the lady and two children, he or someone else had moved her over to 13.

Q. Was your daughter there then?

A. Yes, she went right on then after I got up and was sitting in the next seat. You see, I was sitting this way, my back facing east, and the other seat in front of me in number 12 was facing—anyhow, I was facing west and going east.

Q. You just got up out of the seat in Section 10 and went around the partition and sat down in Section 12 in the seat nearest to Section 10, is that right?

A. Yes.

Q. You moved as soon as the porter came and told you the lady [89] had gotten out of there?

A. Yes, I don't know how long the lady was out, but she was all seated.

Q. The porter was there and you moved as soon as he told you?

A. Yes.

Q. All you did was get up, turn around and go into the other space?

A. Yes.

Q. The porter was right there, was he not?

A. He was right there when he told us we could have it, then he went on right down the aisle. He was pretty busy getting people straightened out.

Q. You don't know where your suitcase was?

A. No. The little one was on the seat, but he must have put the other one under 12.

(Testimony of Mary Ann Harrington.)

Q. You think he put the other suitcase under 12? A. I am not sure.

Q. Do you know what happened to the overnight bag? Do you know whether he put that in Section 12?

A. He must have, he must have dropped it in there.

Q. While you were going around?

A. Yes.

Q. Do you know whether he moved your coats?

A. I don't know whether he moved my coats or whether my daughter moved them. [90]

Q. Your daughter was still there, is that right?

A. I don't know. She was right there when he said we could have our seats, and she may have picked them up then. I didn't ask her anything about them, but I know she put the hat right on top of the coats. Then I discovered I was riding backwards——(interrupted)

Q. Your daughter was still with you when you moved out of 10 into 12?

A. She was still there, but she didn't sit down.

Q. She didn't sit down?

A. She didn't sit down.

Q. Where did she go?

A. She went to the waiting room.

Q. Waiting room?

A. Waiting room or dressing room, I guess.

Q. At the time you made the move, do you know whether you were still in Seattle?

(Testimony of Mary Ann Harrington.)

A. I don't know, but the train must have been moving because I knew I was riding backwards.

Q. Do you know the train was moving at the time you moved from Section 10 to 12?

A. When I got up?

Q. Yes. A. I couldn't say.

Q. You don't know whether the train was moving or standing [91] still?

A. I remember that right away I thought, "I am riding backwards."

Q. At the time you walked from 10 to 12, you don't know whether the train was then standing still or moving? A. No.

Court: She has answered the question half a dozen times, counsel, I don't think you have to go over and over it again. She said she don't remember.

Mr. Pauly: I misunderstood, I am sorry. I haven't understood that she definitely answered that. I don't intend to repeat, no, but I do want to have an answer.

Court: Mrs. Harrington, didn't you say you don't remember whether the train was moving or not at the time you moved from Section 10 to Section 12?

A. I can't recall, but I know right away I noticed I was riding backwards.

Q. (By Mr. Pauly): Where were your coats and your overnight bag put?

A. The overnight bag was lying on the side

(Testimony of Mary Ann Harrington.)

near the window and I was seated along side of it near the aisle.

Q. The overnight bag was put on the same seat you were sitting on? A. Yes.

Q. The coats were put where? [92]

A. Opposite me.

Q. On the opposite seat?

A. On the opposite seat.

Q. Do you recall near the aisle or near the window?

A. Near the aisle. I never got near the window. That was my idea in picking up the hat and getting up.

Q. Where was the hat?

A. On top of the coats. I said, "When the train stops, I'll hang up my hat and get over near the window, change my seat." When the train stopped, I got up and picked up my hat. My hat was right in the seat opposite me. I picked up the hat and made one step down towards the window, and I had my hand up like this (indicating) to throw the hat up. The hook was up high, and before I could even throw it, why the train gave a terrible jerk and the hat went under the seat.

Q. Was the train stopped or in motion, do you know, when you first started to move the hat?

A. The train was stopped, or I wouldn't get up to try it. The train was stopped, and I picked it up and when I gave one step down to throw up the hat, the train just gave a jerk, just like that.

(Testimony of Mary Ann Harrington.)

My two feet went out from under me, and I fell down.

Q. Is it your thought the jerk occurred as the train started or after it had gotten under way?

A. I was so knocked out, I can't remember that.

Q. You don't know? [93]

A. I don't know whether it was going then or not. It was just like one car bumped into another, the jerk.

Q. Mrs. Harrington, I show you a picture here marked Defendant's Exhibit Number 1-A, and I will ask you if that, if, according to your recollection, that is a fair picture of the section you were sitting in at the time of the accident?

A. That is. I was sitting right here (indicating).

Q. Just answer the question. Do you recognize it?

A. Yes, here it shows the hook away over here up high (indicating).

Q. That is what I am going to ask you. Does that show the hook?

A. I can't see the hook. It was there (indicating).

Q. As a matter of fact, you are pointing to the hook in the picture as you point.

A. That is all I saw. I reached over and picked the hat up here (indicating). I just made about one step and got my hand about half ways up to throw it when the jerk came.

(Testimony of Mary Ann Harrington.)

Q. Mrs. Harrington, will you again point out to Mr. McCaffery where the hook is that you were trying to hang your hat on?

A. Right here (indicating). That is the only hook I saw.

Mr. McCaffery, Jr.: If the Court please, I will make this with the letter X on the Exhibit, which is Defendant's Exhibit 1-A.

Witness: I could see it very distinctly when I was sitting [94] down.

Q. And you were sitting here next to the aisle?

A. Right here (indicating).

Q. In the seat opposite the hook?

A. The seat opposite the hook. That is the only hook I saw. I saw that hook and picked up the hat off the coat right here (indicating).

Q. Mrs. Harrington, if I write the word "seated" here where you have just pointed—I have written the word "seated." That is the place you were sitting before you tried to hang the hat?

A. Yes, and this is where the hat was, right opposite (indicating).

Q. I will write the word "hat" where you have pointed.

A. I picked up the hat and took it and just took about one step down here (indicating), as near as I can remember, the one step, and lifted up my hand just like that (indicating) to throw up the hat when the jerk came and my two feet went straight out from under me, and I went

(Testimony of Mary Ann Harrington.)

backwards, flat on my back, and the hat went under the seat. It was still there when the conductors came in.

Q. You don't know how far from Seattle the train was at that time?

A. No, I wasn't paying any attention to how far it was out.

Q. Are you familiar with any of the other stations after you leave Seattle? [95]

A. No, I am not familiar with them, because mostly always when I left Seattle before, I left at night.

Q. Would you be able to tell us how long it was after you left Seattle?

A. No, I can't even tell you how long it was, whether it was 10, 15 or 20 minutes even, I don't know. All I remember I am riding backwards. I am going to get up when the train stops and hang up my hat and move over there.

Q. You have referred to this as being a jerk like two cars coming together?

A. Yes, just an awful jerk.

Q. Am I correct in understanding that you mean by that a jerk such as if they had coupled on another car to the train?

A. That is what I thought it must have been.

Q. You thought they were coupling another car on to the train? A. Yes.

Q. You didn't mean by that you thought another train had run into the one you were riding

(Testimony of Mary Ann Harrington.)

on?

A. No, I thought they had put on another car and gave a jerk.

Q. I don't suppose you are familiar with the way cars are coupled together, are you, Mrs. Harrington? A. No.

Q. In hanging up the hat, did you lean over the seat so as to reach the hook? [96]

A. No, I never leaned over the seat. If I was leaning over the seat, I guess maybe I would have been protected.

Q. Did you have one knee on the seat?

A. No, I did not.

Q. You had both feet on the floor.

A. Both feet on the floor, and both feet went out together.

Q. I understand in the complaint it is alleged you were off balance. Were you off balance at the time you were trying to hang up the hat and this jerk occurred?

A. Off balance, you mean standing in the middle of the aisle to throw up the hat?

Q. In the middle of the space between the two seats.

A. Yes, in the middle of the space, I would say, close to the seat near the window, that maybe I got that far. I must have when I tried to hang up the hat. That is when the jerk came.

Q. You were facing?

(Testimony of Mary Ann Harrington.)

A. I was facing the window, and the hook was right along side the window.

Q. You were not bending over?

A. I was not bending over.

Q. You had both feet on the floor?

A. Both feet on the ground.

Q. Did you fall backwards?

A. Fell backwards, yes. My two feet went toward the window and my head went toward the aisle. I can't say how far my head [97] went, because I don't know how long I was lying there before the people saw me.

Q. Do you know whether you hit the seat before striking the floor? A. No, I don't.

Q. Your daughter wasn't present?

A. No, she wasn't present.

Q. She had not returned?

A. She had not returned. This lady said, "I'll go and get your daughter," she said. I said to her first, "Oh, maybe I will be all right." I remember that.

Q. That was after you had been picked up?

A. After I had been picked up. Then I said, "Do you know where my daughter is?" Then she said, "Yes," so she went and got her. Before she got down, two conductors come along.

Q. To pick up the tickets?

A. To pick up tickets.

Q. How long after you fell, Mrs. Harrington,

(Testimony of Mary Ann Harrington.)

was it when the conductor came through picking up tickets?

A. When you are in pain it seems a long time, but maybe it wasn't. I said to him, "I am hurt and my daughter has got my ticket," and they were both together, and the other one spoke up and said, "I got the tickets going down the aisle."

Q. It is your recollection there were two conductors at the same time? [98]

A. Yes, and he asked for my ticket.

Q. Although you don't know how long it was after the accident when the conductor came, you do know he got there before your daughter came?

A. I know he got there before my daughter came, and I think he got the man that was dressed in gray, some other agent, and they said to me, to those people, "Did you see her fall," and they said, "No."

Q. Wait, Mrs. Harrington, before you go on. I want to get the facts as chronologically as I can. At the time the conductor first arrived and asked for your ticket and before your daughter had come back?

A. Yes.

Q. Directing your attention to that time——
(interrupted)

Court: Counsel, it is after five o'clock. Will you have quite some more examination to conduct?

Mr. Pauly: Yes, more, perhaps, than we should try to attempt at this time.

(Testimony of Mary Ann Harrington.)

(Whereupon, the jury was duly admonished, and a recess was taken until 10 o'clock A.M. the following morning, October 20, 1949, at which time, the jury being present and counsel for both parties being present, the following proceedings were had:)

Cross-Examination of Mary Ann Harrington
(Continued)

By Mr. Pauly:

Q. Mrs. Harrington, after you moved into Section 12 from Section 10? [99] A. Yes.

Q. And was seated there, how long was it, if you know, approximately how long was it from that time when you got moved into Section 12 until the accident occurred?

A. I didn't pay any attention to the time. I imagine maybe 15 or 20 minutes, I don't know, maybe not that long.

Q. You had been sitting there some considerable time, in any event, after you had been moved into Section 12 and before you got up to hang the hat up? A. Into 12?

Q. Yes.

A. Yes, I was there some time. I wasn't paying any attention to the time. All I was paying any attention to was I was riding backwards and that I would pick up my hat, hang it up and sit next to the window on the other side. I was facing east and going west.

(Testimony of Mary Ann Harrington.)

Q. You were waiting for the train to stop?

A. Before I hung up my hat.

Q. Your daughter wasn't with you during that time?

A. No, when I sat down from 10 to 12, my daughter—she did stay there until he came back.

Q. During that time you were sitting there waiting for the train to stop, you didn't during that time ring for the porter?

A. No, I didn't. I was just waiting for the train to stop.

Mr. McCaffery, Jr.: We will ask at this time that the [100] answer be stricken and the plaintiff be given an opportunity to interpose an objection to the question.

Court: Very well, what is your objection?

Mr. McCaffery, Jr.: The objection is, it is an attempt on the part of the defendant to establish a part of its defense in plaintiff's case in chief; that the question assumes a state of facts which haven't been shown to exist. There is no evidence before the Court at this time that any porter was in the sleeping car. It is an endeavor to establish the defendant's defense in the plaintiff's case in chief, the defendant's defense of contributory negligence. The issue of whether or not it is to be admitted in evidence hasn't come before the court at this time. When it does, there will be an objection to it.

Court: Overruled.

Mr. Pauly: I take it then, your Honor, that the answer to the question may stand?

(Testimony of Mary Ann Harrington.)

Court: The answer may stand to the question.

Q. You, of course, Mrs. Harrington, know, do you not, that there is a bell in the section that may be used for the purpose of calling a porter?

A. Yes.

Court: Just a minute, now. The Court has ruled just with reference to the particular question as to what she did. Going further in the line you are now pursuing does come within the [101] objection that Mr. McCaffery has made.

Mr. Pauly: May it please the Court, my thought in asking question regarding the bell and the like is prompted with this thought: She testified, I believe, in effect, if my recollection serves me correctly, that after they were moved into Section 12, at which time the porter assisted them, that from that time on, she did not see the porter any further. Now, I believe it proper in that connection, in amplification of that subject, the absence of the porter, to explain the fact that no attempt was made on her part, if it be the fact, to get him.

Court: She has so testified that she did not call the porter.

Mr. Pauly: In amplification of that, I believe it important to determine if she knew of the presence of a bell there, or whether there was a bell there which could be used for the purpose of calling the porter.

Mr. McCaffery, Jr.: There is no establishing of the fact that the bell was in working order, no

(Testimony of Mary Ann Harrington.)

proper foundation made for the introduction of such evidence, and improper cross examination.

Court: Sustained.

Mr. Pauly: So I know how to proceed in the case, do I take it the Court's ruling is I should be precluded at this time from any further questioning on the bell? I am not clear on [102] the question.

Court: The Court can't rule on something that hasn't come before the Court yet. I don't know, there may be some questions which are permissible, but I don't think the question you have just asked comes within proper cross-examination at this time.

Mr. Pauly: As to whether she rang the bell?

Court: No, you asked her that. The Court permitted that answer that she didn't ring the bell or call the porter. Isn't that the question I overruled Mr. McCaffery's objection to?

Mr. Pauly: My question, as I recall, is whether she knew there was a bell there for that purpose. I understand the Court's ruling is that is objectionable.

Mr. McCaffery, Jr.: At this time, if the Court please, we will withdraw the objection and ask that the answer be reinstated.

Court: Very well, that is with reference——

Mr. McCaffery, Jr.: Just that there is a bell there.

Court: That she knew there was a bell there to ring.

(Testimony of Mary Ann Harrington.)

Mr. McCaffery, Jr.: Yes.

Court: Very well, let the answer stand.

Q. Did you make any other attempt to call the porter?

A. No, I didn't make any attempt. In fact, I didn't know where the bell was. It is the first time I rode on the train. [103] I never thought of calling the porter. All I thought of was when the train would stop, I would pick up the hat and hang it up as I had done many times previous on trains.

Q. In riding on trains previously, you knew there was a bell which could be used to call the porter? A. Yes.

Mr. McCaffery, Jr.: We will ask that the answer be stricken.

Court: It may be stricken.

Mr. McCaffery, Jr.: Object to the question as assuming a state of facts not shown to exist by the evidence. What condition she knew to exist in other trains is not pertinent to the condition which existed in the train on which she was riding at that time.

Court: Sustained.

Mr. Pauly: Frankly, I am confused. I want to comply with the Court's orders. If this is——
(interrupted)

Court: You have asked her now with reference to what she knew about conditions in other trains.

Mr. Pauly: Her experience.

(Testimony of Mary Ann Harrington.)

Court: Her experience in other trains with reference to the existence or non-existence of a bell, and the Court has sustained the objection.

Mrs. Harrington, yesterday I asked you to make a picture, Exhibit 1-A, to indicate there the hook on which you intended [104] to hang the hat. In that picture, there is only one pair of hooks shown?

A. Yes.

Q. There may be some confusion in the minds of the Court or the jury or others whether, since there is only one pair of hooks shown in that picture and not the second hook, whether your answer is entirely clear, I don't know. I, therefore, show you another picture marked Exhibit 1-C, which shows one end of Section 12, and in which two separate hooks appear, one toward the window, at which I am now pointing——(interrupted)

A. Yes, that is the one.

Q. And another hook near the aisle but somewhat higher, and ask you will you designate on that picture which hook you were hanging your hat on.

A. On the one near the window. You see, my hat was right here (indicating). I picked it up. I thought I took one or two steps and I tried to hang the hat up. I had my hand like that (indicating) to hang up the hat and the train gave a jerk like that and my two feet went from under me.

Q. I will mark the hook to which she pointed with an "X" and an arrow pointing to it. Did you know approximately how long it was after the

(Testimony of Mary Ann Harrington.)

conductor came to your section following the accident until you went to your berth, that is, the berth was made up and you occupied the berth?

A. I was in too much pain to remember anything like that. I [105] was lying on the sofa in the restroom while it was being made up and I wasn't anxious to even move off the sofa.

Court: The Court is thinking of the evidence that the question you made asked for, to which the Court sustained objection, with reference to her experience on trains generally, and the Court has reconsidered and decided that you may ask that question with reference to her experience on trains and the existence of bells with which to call attendants, so you may ask that question and counsel can raise an objection.

Mr. Pauly: Thank you. You testified previously that before this accident you had ridden on many trains.

A. Many trains for over 40 years.

Q. Do you recall whether on trains that you rode previously was there a bell in the sections by which a person sitting there could summon the porter if they cared to use it?

A. As near as I can remember——(interrupted)

Mr. McCaffery, Jr.: Just a minute, please, Mrs. Harrington. To which the plaintiff objects on the grounds and for the reason that the question isn't sufficiently definite to direct the attention of the witness to whether or not she was riding in coaches,

(Testimony of Mary Ann Harrington.)

tourist sections, Pullman sections, or in which part of the train or what accommodations she had; that under those circumstances it would assume a fact not in evidence; that her experience on other trains would not be a guide to this jury in determining whether or not a bell or signaling [106] system existed in the train upon which she was then riding at the time of the accident; further, there is no foundation laid to show that her act of ringing the bell would have summoned a porter and that a porter was in attendance; further that there is no foundation laid to show that the bell system was in operation at the time and that her attempt to have summoned a porter would have resulted in anyone answering the call; further that the question is directed to an attempt to establish the defendant's defense in the plaintiff's case in chief, and it is improper cross-examination.

Court: The objection is overruled for all parts, except I do think counsel should make a setting with reference to her previous experience on trains of similar character under similar travel conditions, with reference to the type of accommodations.

Q. Let me ask you this then, simply, Mrs. Harrington. Generally speaking and based on your experience in previous railroad travel, while riding in sleeping cars, do you know whether or not, generally speaking, a bell is provided in the section whereby a passenger may summon the porter if they care to? A. Yes, they do.

(Testimony of Mary Ann Harrington.)

Q. In this particular instance, you stated you had never been on this train previously?

A. No. [107]

Q. Did you make any examination to determine whether such a bell existed in this particular section?

A. No, I did not, no, I didn't even think of the bell.

Q. You simply set your mind on waiting until the train stopped? A. Yes.

Q. So you yourself could move your seat?

A. Move the hat and sit near the window and face east instead of riding backwards.

Q. It didn't occur to you to obtain assistance from anyone else, including the porter?

A. No.

Mr. Pauly: That is all.

Mr. McCaffery, Jr.: That is all.

(Witness excused.)

MARJORY HARRINGTON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Myers:

Q. State your name, please?

A. Marjory Harrington.

Q. And your residence?

A. 801 West Galena, Butte. [108]

(Testimony of Marjory Harrington.)

Q. What is your occupation?

A. Teacher.

Q. Are you related to Mary Ann Harrington, the plaintiff in this case?

A. She is my Mother.

Q. You live with her, do you not?

A. Yes.

Q. Did you accompany Mrs. Harrington on a trip to California in the summer of 1947?

A. I accompanied her from Seattle down and then from California back.

Q. Will you tell the Court and jury briefly what arrangements you made for the tickets and reservations on the return trip?

A. On the return trip, we were in Marysville at the time. I went for reservations for the standard. I had a return trip from Butte here. I was informed there were no reservations opened at that time, so he told me to come back in a day or so; so I went back in a day or two days, and he said there were reservations I could get on the tourist, but I could not get any reservations on the standard. So, I asked when I might have reservations on the tourist. He said it would be one week from then. He said on the standard, I might have to wait for two weeks. I had to return to school, so took the reservations on the tourist, and Mother, I wanted her to remain behind and wait, but in the meantime she had received word my brother-in-law [109] was ill and she decided to accompany

(Testimony of Marjory Harrington.)

me home. He said he could give us reservations only as far as Deer Lodge. I knew by that time we would be up and dressed, so we took the reservations to Deer Lodge.

Q. On the trip, as your train came into Seattle from the south, was it on time?

A. No, our train was late.

Q. Do you know how late it was?

A. I would say from 15 to 20 minutes.

Q. How much time did you have in Seattle?

A. We had approximately, not more than half hour.

Q. What did you do in Seattle?

A. In Seattle we got off the train from California and I went upstairs—Mother accompanied me—to the station, and I purchased her ticket from Seattle to Butte. Then I took her ticket and went to the baggage room and checked a suitcase. I had already checked luggage on my ticket from California. Then, after checking the suitcase, we came down the steps and boarded the train. On the platform was a porter. He took my little overnight case and Mother's small suitcase and brought them into the train. I told him our section was 12. We got in and he said, "You must be mistaken," he said, "12 is occupied."

Mr. Garlington: Just a minute, please. Before your testimony is given here concerning statements made by the porter [110] with respect to the space, we should like an opportunity to state an objection.

Court: Very well.

(Testimony of Marjory Harrington.)

Mr. Garlington: We object to any testimony from this witness concerning statements made by the porter with respect to the ticket space on the train for each of the following reasons: That any statements made by him would be hearsay statements, based upon hearsay if made, that it isn't shown that any statements made by the porter were authorized by the defendant or within the scope of the duty of the porter and that they are not admissions or statements which would be binding upon the defendant; that any such statements are incompetent, irrelevant and immaterial in that they do not establish any breach of any legal duty owing from the defendant to the plaintiff which was or could have been the proximate cause of any injury to the plaintiff, and that any statements by the porter with respect to the contract of carriage and the reservation of seat space would not be the best evidence with respect to that subject.

Court: Sustained. Don't tell what the porter said to you, just what the conditions were that existed.

Q. Miss Harrington, what happened when you boarded the train?

A. When we boarded the train, I also saw Section 12 occupied. The porter, as I say, had our suitcases, so he set my overnight grip down on the seat in Section 10 and he left us then, so I [111] stood in the aisle and waited. Mother sat down in Section 10. and shortly after, when he returned,

(Testimony of Marjory Harrington.)

he removed the people from 12 to the opposite seats. He picked up my suitcase and set it down on the seat which was facing east, which should have been the seat Mother should have occupied.

Q. That is the seat facing forward in the train?

A. Yes. I had my coat over my arm, so I set my coat down. There was—the aisle was crowded, with everyone moving. I had been waiting to go to the rest room. She had a magazine, Mother and I, we had been reading the same story the night before. I handed her the magazine and said, “I am going to the restroom, and I will find a story in the observation car.”

Q. When did the train start moving to leave Seattle with reference to these events which you have just described?

A. The train was already moving. That is why I was going to the restroom.

Q. You know of your own knowledge, of your own recollection, that the train was moving?

A. Yes, the train was moving.

Q. Then what happened?

A. I went in the restroom. I was there, I would say, maybe 10 minutes. I walked back to the observation car and picked up two or three magazines. I found one I was looking for and I took it to a seat and sat down and was reading. While I was reading, the two conductors came for the tickets, and I said [112] I was in Car A-16, Section 12 and I had Mother's ticket, so he took the tickets

(Testimony of Marjory Harrington.)

and I continued reading. I was reading but a few minutes and a woman came back and said, "Your mother has had a bad fall. She wants you to come immediately." So, of course, I hurried back to car A-16.

Q. Do you know how long you were gone from the time you left your mother until the time you returned?

A. It may have been 30 minutes, or it could have been 45. I couldn't say how many pages I had read in the book.

Q. What happened when you returned to your mother?

A. When I returned, Mother said, "I have had a terrible fall and my back is hurt," so I said, "Well, Mother, what happened?" She said, "Well"—— (interrupted)

Mr. Garlington: Just a minute. I should like to make another objection at this point with respect to any communication between the plaintiff and her daughter made at the time described by the witness. The objection is that under the facts as shown, statements made by the plaintiff to her daughter would be self-serving declarations, which are not, under the facts shown, part of the *res gestae*, that they would be simply an unsworn narrative of a past event and would be inadmissible corroboration of the plaintiff's own testimony, who has already appeared on the witness stand, and for those reasons would be incompetent, irrelevant and immaterial.

(Testimony of Marjory Harrington.)

Mr. Myers: If the Court please, it is our contention that [113] the conversation between the witness and her mother as testified to would be admissible as part of the *res gestae* in that it was but a short time after the accident had occurred, and that it characterized the manner in which the accident had occurred, and in that it took place before there had been time for any thought or any calculation of a story which would be beneficial to the plaintiff; that it is in effect a part of the accident itself, that it speaks as part of the accident, and, therefore, is admissible as part of the *res gestae*.

Court: The objection is sustained.

Q. How long had you been seated in the observation car before the conductor approached for your ticket?

A. Well, as I say, I was reading, and when you become interested in a story, you don't pay much attention to time. I would say, maybe 20 minutes, as near as I can remember.

Q. How long after that was it you were recalled to return to your mother?

A. Perhaps 10 or 15 minutes.

Q. Do you know how much time had elapsed between the accident to your mother and your return to her?

A. I would say but a very few minutes, because the woman said to me when she saw how badly Mother was injured, that she came back to get me,

(Testimony of Marjory Harrington.)

and when I returned, the suitcase was still on her seat.

Q. How many cars intervened between the observation car and [114] Car A-16 upon which your mother was riding?

A. I would say two or three.

Q. Will you describe your mother's physical appearance when you returned to Section 12?

A. I could tell by the expression on her face she was in great pain, and, of course, her nerves were in bad shape, she was very shaken up.

Q. Where was she seated at that time?

A. She was seated facing west and nothing had been done. The porter hadn't brought her a pillow, he hadn't taken care of the suitcase off the seat, her hat was still there.

Q. Did you have occasion at that time to observe the condition of the flooring within Section 12 between the two facing seats?

A. Yes, I did, because I asked Mother how the accident happened. She said the floor was slippery.

Mr. Garlington: Just a minute. May we renew the same objection as to the statements of the plaintiff to the witness?

Court: Yes, don't tell what your mother said to you, just tell what you saw with reference to the condition existing.

A. Then I looked at the floor. I saw the floor was, I would say, an asphalt tiling, and I noticed down the aisle was carpeting.

(Testimony of Marjory Harrington.)

Q. What was the condition of the asphalt tile as to whether or not it was polished? [115]

Mr. Garlington: Just a minute, now. With respect to that, I desire to register an objection. If it is sought by this testimony to establish some defective condition of the particular area of floor in this seat, that is incompetent, irrelevant and immaterial, because there is nothing in the pleading charging a defect in that condition.

Court: The purpose of it, as I see it, is just to tell what the actual condition was.

Mr. Garlington: As long as we are not enlarging or changing the issue.

Court: I don't see it changes the issue at all, Mr. Garlington. It just tells what the condition of the floor was at that time. Proceed.

A. I saw the type of flooring, and as Mother had stated, the terrible jerk had come which shot her feet out——(interrupted)

Q. Just state the physical condition.

A. Seeing the condition Mother was in, I decided I had better get her berth made up immediately.

Q. Just a minute. Will you repeat the question?

(Question read back by reporter as follows:
What was the condition of the asphalt tile as to whether or not it was polished?)

A. I could see it was a slippery floor. Whether or not additional, extra polish had been added, I could not state.

(Testimony of Marjory Harrington.)

Q. Was there a shine to the surface? [116]

A. There was a shine, yes.

Q. Were any train officials around when you returned to your mother?

A. Not when I returned. While I was talking to her, two conductors returned and the Passenger Agent. Mother had already told them she had been injured.

Q. What did these train officials do?

A. They asked for Mother's name, my name, and then they turned to the people on the car and asked if any of the people had seen her fall, and the only person who admitted she had seen her fall was a young child who sat opposite. She said, "Mother, I saw the lady fall. She had her hand up hanging up her hat," she says, "when the train jerked. Then she fell." So the mother said, "Child, you are too young to see that." I asked the lady if she has seen or what her name was, but she didn't state it to me.

Q. What did the officials do after having asked if there were witnesses to the fall?

A. They turned and left the car. They didn't ask if they could be of assistance or whether Mother needed help or not.

Q. What did you do?

A. I rang for the porter. No porter came. I walked down the car looking for him and I didn't see him. I took Mother into the rest room and laid her on the couch. I went again looking for the

(Testimony of Marjory Harrington.)

porter, I rang for him again. When he came, I asked [117] to have the berth made up immediately. I went back into the rest room and told Mother I would get her a cup of tea, I thought tea might help. I went to the club car and had a pot of tea made. I returned to the rest room and helped Mother drink it. By that time she was shaking so she couldn't hold the cup. I held the cup for her, but she couldn't retain the tea, so I checked to see if the berth was ready. When it was ready, I took her back in. I said, "I will undress you now, make you easy." She said, "I am in too much pain, I will lie here." Realizing how badly she was injured, I went again in search of the porter and said, "Will you please go find the conductor and have him check on the train to see if there is a doctor, and if there isn't, to wire to the first station and see that a doctor meets the train." After a while, he returned and said a doctor would meet the train in Spokane, so when the doctor came on the train, I said I wanted Mother removed to a hospital, so he said, he checked her over and couldn't find any broken bones. He said he would give her some sleeping tablets and thought she could go on to Butte. He gave her sleeping tablets, and shortly after she fell asleep. I checked her several times during the night and she seemed to be sleeping every time, so when morning came, I saw she was having difficulty talking, and she said her back was in terrible pain, so I went again to the porter and asked him if he would find

(Testimony of Marjory Harrington.)

the conductor or passenger agent and wire for an ambulance to [118] meet the train in Butte. After a time, he came and said they had wired for a wheel chair, so I said that a wheel chair would not serve, that she was in too much pain and she had to have an ambulance, so after a time he came back and said it was too late to wire for an ambulance, we were not making another stop and that the wheel chair would have to serve. So, when we arrived in Butte, the conductors nor the porter made any effort or offered any assistance to help Mother get off. It so happened that the son of a friend of mine was on his way to West Point, so he came back and assisted me getting Mother off the train on to the wheel chair. At that time the train pulled off giving us barely time to get off the train. So, the boy with the wheel chair wheeled her up to the depot. The one taxi that there was there was occupied and was occupied by a nun. So she said Mother could get into the taxi with her. She got out to help me to assist Mother in. During all this time, no one had come near to ask if they could assist, if she needed anything or how her pain was.

Q. Miss Harrington, during the time that has intervened from your mother's arrival in Butte, August 27, 1947, up to the present time, what has been her condition regarding ability to care for herself?

A. She is unable to care for herself at all. She needs constant care.

(Testimony of Marjory Harrington.)

Q. Is that true at the present time? [119]

A. At the present time she needs care during the day, not at night. After we get her to bed, she doesn't need care during the night. For the first few months we had her at home, she needed care all night long.

Q. At the present time, would you describe briefly the care that is required in the day time?

A. Well, in the morning when she gets up, she dresses herself now, and she is able to come downstairs for breakfast. After she has breakfast, she just sits at the table. We fix breakfast and wait on her. We assist her into the living room where she sits in her chair, and, of course, she is not able to do anything except sit there for the day. She sits there until it is her bedtime, when we assist her upstairs and get her into bed. On Sunday now, she is able to go to church with our assistance. We help her into the car. Most Sundays she can go to church. That is the extent to which we can do anything.

Q. What was her physical condition before the accident?

A. Her physical condition was very fine. In fact, for a woman her age, it was unusual. She had never known sickness and she had always been blessed with good health and had been able to care for herself absolutely.

Q. Did she require any of the care which you have described that you now give her? A. No.

(Testimony of Marjory Harrington.)

Q. Miss Harrington, in regard to financial matters, do you [120] pay bills for your mother and handle financial transactions for her?

A. I paid bills for her from the time of her accident until a few months ago because, of course, she wasn't able to write or read. In fact, she knew nothing of what was going on for many weeks.

Q. Did you have occasion to pay the bills for the hospital?

A. Yes, it was necessary that I pay them.

Q. The nurses had to be paid each week?

A. Yes.

Q. Did you pay the nursing bills also?

A. Yes.

Q. When expenses were necessary such as the purchase of drugs and other incidental expenses to her illness, did you pay those?

A. I paid some of them, and my other sisters paid. It all depended on whoever went to the drug store to pick up the drugs.

Q. Are you familiar with the amount of drugs that were purchased and the approximate cost of those?

A. I know she was given several million units of penicillin. She was given, I think, sulfa; she was given sleeping tablets, she was given liver shots, she was given pills to help her retain food. She couldn't retain any food.

Q. Can you tell us the total expense for medicine and drugs, [121] have you got that?

(Testimony of Marjory Harrington.)

A: The total I paid, I would say, was in the neighborhood of maybe \$125 or \$150, but what the rest of the family paid, I couldn't say. That doesn't include penicillin, of course, the penicillin was mostly when she was in the hospital.

Mr. Myers: Counsel, have you had an opportunity to examine the checks in connection with the payment of nurses?

Mr. Pauly: No, they were handed to me just before Court.

Mr. Myers: Your Honor, we have a rather extensive series of checks involving the payment of nurses, and if counsel—— (interrupted).

Court: I should think counsel could get together on that matter. I don't think we ought to encumber the record with those.

Mr. Myers: It is our calculation that the total nursing expense was \$2,265.05. If you would like to examine those checks.

Mr. Pauly: I don't care to take the time to do that. If counsel has stated they have checked them and it is a correct total, we are willing to accept it.

Mr. Myers: It may be stipulated that \$2,265.05 were paid out for nursing care for Mary Ann Harrington in connection with the injury received in the Milwaukee train.

Court: Very well, let the record so show.

Q. Miss Harrington, showing you what has been marked Plaintiff's [122] Exhibit No. 2, will you tell us what that is?

(Testimony of Marjory Harrington.)

A. This covers the hospital bill for the first time, first period Mother was in the Hospital, from the 27th of August to the 27th of November.

Q. What is the amount of that bill?

A. The amount of the bill is \$1018.80.

Q. Did you pay that bill? A. Yes.

Q. Did you pay the entire amount of \$1018.80?

A. No, I paid \$995. There was a discount of \$23.80. I asked the girl at the desk what that covered. She said the amount of penicillin that had been given, that was deducted from the cost of it. The cost here is given as \$84.00.

Q. In other words, there was a discount given from that total charge for penicillin?

A. Yes, making the bill \$995 that I paid.

Q. You paid this how?

A. By check. The check is with the group there on the table, the cancelled check.

Q. Whose money was actually paid?

A. It was Mother's money actually paid.

Q. Showing you what has been marked Plaintiff's Exhibit 2-A, will you tell us what that is?

A. This covers the period the second time Mother had to return to the hospital, which was the 13th of April to the 29th of April. The amount of this is \$196.35. [123]

Q. Did you pay this bill? A. Yes.

Q. How did you pay it?

A. I paid it by check also.

Q. Whose money was it you paid?

A. Mother's money.

(Testimony of Marjory Harrington.)

Mr. Garlington: The defendant will stipulate that the hospital care is at a reasonable rate for the period involved in order to avoid the necessity of calling a witness for that purpose.

Court: Very well, will it be stipulated that the amount charged was paid and that it is reasonable?

Mr. Garlington: Yes, your Honor, that is agreeable.

Mr. Myers: May we offer Plaintiff's Exhibit 2 and 2-A in evidence, your Honor?

Mr. Garlington: No objection.

Court: Very well, they will be so admitted.

PLAINTIFF'S EXHIBIT 2

“245
Pl Ex #2

“St. James Hospital Phone 2-1281
Idaho and Silver Streets

Filed Butte, Montana, December 2, 1947
Oct. 25-1949
H. H. Walker, Clerk
By D. F. Holland, Deputy
Miss Marjorie Harrington
801 West Galena
City

“Account of Mrs. Mary Ann Harrington:

Date	Items	Debit	Credit	Balance
8/27/47	Bill rendered			
to	Room and Care	819.00		
11/26/47	Operating Room			
	Anesthetic		Paid in Full	
	Laboratory	42.00	12-9-47	
	X-Ray	15.00	St. James Hospital	
	Drugs & Dressings	31.80	McNulty.	
	Penicillin:	84.00		
	Intravenous:	27.00		
	Phone Service			
		<hr/> \$1018.80	%\$23.80	\$995.00”

(Testimony of Marjory Harrington.)

PLAINTIFF'S EXHIBIT 2-A

"St. James Hospital Phone 2-1281
Idaho and Silver Streets

Pl Ex #2A

Butte, Montana, May 3, 1948

#245

Filed Oct. 25, 1949

Mrs. Mary A. Harrington

H. H. Walker, Clerk

By D. F. Holland, Deputy

801 W. Galena
City

Date	Items	Debit	Credit	Balance
4/13/48	Bill Rendered			
to	Room and Care	128.00		
4/29/48	Operating Room			
	Intravenous	11.00		
	Laboratory	11.00		
	Duracillin	42.00		
	Drugs	1.35		
	Oxygen	3.00		
	Phone Service			
		<hr/>		
		\$196.35	196.35
		<hr/>		

We were not sure whether or not we had mailed this."

Q. (By Mr. Myers): Returning to the stopover in Seattle on your trip from California, you have testified, I believe, that [125] you purchased a ticket from Seattle to Butte for your mother in the Seattle depot, is that correct? A. Yes.

Q. Was there a line at the ticket window?

A. There were, I would say, maybe three or four ahead of me, and then when I went to the baggage room, there were also three or four in line in the baggage room.

(Testimony of Marjory Harrington.)

Q. When you went to board the train, did the porter ask to see your sleeping car accommodations?

A. No, I noticed A-16 on the window, so I stopped and he asked me what my seat was. I said it was section 12.

Q. After you found Section 12 occupied by other people, did you show your ticket to the porter?

A. Yes, I did.

Q. It was for Section 12, the section which was occupied at that time? A. Section 12, yes.

Mr. Myers: You may cross-examine.

Cross-Examination

By Mr. Pauly:

Q. At the time you boarded the train, Miss Harrington, did you have one or two pieces of luggage?

A. I had a light grip of Mother's and then a small overnight case of mine. [126]

Q. There were two pieces? A. Yes.

Q. And did you have any assistance by a Red Cap in going from the station to the car?

A. I don't believe so. We were in a hurry to get on the car, and, as I say, I had been in the baggage room and just hurried down the steps to make the train.

Q. You checked some luggage in the baggage room? A. In Seattle, yes.

Q. How many pieces? A. One piece.

Q. You got off the California train with three pieces of luggage, then checked one in the Seattle station and boarded this train with two pieces?

(Testimony of Marjory Harrington.)

A. Yes.

Q. One of which was an ordinary suit case?

A. Yes.

Q. The other, a smaller overnight bag?

A. Yes.

Q. Approximately what would be the dimensions of the overnight bag?

A. I would say twelve by eight by twelve.

Q. Twelve inches wide, twelve inches high, and eight inches from front to back? A. Yes.

Q. The porter assisted you in getting on the train? A. Yes.

Q. He took your luggage? A. Yes.

Q. Both pieces? A. Yes.

Q. And you testified that due to the fact that Section 12 was occupied by a lady and two children—— A. Yes.

Q. ——you then waited in another section?

A. Mother sat; I stood in the aisle and waited for the porter to return, or the conductor, to give us our proper seats.

Q. What section was that, do you recall?

A. Ten.

Q. Where was it located with respect to Section 12? A. Directly behind Section 12.

Q. On the same side of the aisle? A. Yes.

Q. Were there other people in Section 10?

A. No.

Q. It was entirely empty? A. Yes.

Q. But when your Mother sat down, you stood in the aisle? A. Yes.

(Testimony of Marjory Harrington.)

Q. How long was it then, if you know, from the time your [128] mother and you first arrived and she sat in Section 10 until you were moved into Section 12?

A. I would say it was a matter of, maybe, not more than five minutes, because it was train time and I just stood, knowing we would be pulling out.

Q. Although the rest of Section 10 was empty?

A. Yes.

Q. At least nobody was sitting in there at the time?

A. No.

Q. The porter came back and put you into Section 12?

A. Yes.

Q. Do you know whether the train was then moving, or not?

A. Yes, it was.

Q. It was leaving Seattle?

A. Yes.

Q. It left Seattle on time, did it?

A. I believe so.

Q. Do you know the time yourself?

A. I believe it was 2:45.

Q. In the afternoon?

A. Yes.

Q. Where did the porter put the suitcase, if you know, when you first went in?

A. He set it on the seat in Section 10.

Q. The suitcase, as distinguished from the overnight bag? [129]

A. The suitcase—I noticed the overnight case because I saw it was on the seat. The suitcase I didn't pay any attention to because I had given it to him and knew he would take care of it.

(Testimony of Marjory Harrington.)

Q. You don't know where he put it?

A. No.

Q. Did you carry your own coat?

A. I carried my coat. Mother still was wearing her coat.

Q. Then, in moving to Section 12—do you know where the people went who were, as you say, occupying 12 when you arrived?

A. They went directly opposite us, directly opposite Section 12.

Q. How many of them? Were they men, women or children?

A. No, a woman with two children, children I would say, perhaps, one maybe four and the other six, or maybe five and seven.

Q. Boys or girls? A. Girls.

Q. Both girls? A. Yes.

Q. In making the move of the lady and two children from your Section 12 across the aisle, do you know whether any luggage was moved?

A. No, I didn't pay any attention to that. [130]

Q. Do you know whether any coats were moved?

A. No.

Q. All you knew was the lady and children got out of there and sat in the section across the aisle?

A. Yes. I know we had been told that was occupied.

Q. I am not asking you what you had been told by anyone, just what you did. Did the porter then assist you and your mother in going from Section 10 to 12?

(Testimony of Marjory Harrington.)

A. He picked up the suitcase or overnight case that was on the seat and placed it on the seat in Section 12.

Q. Would that be the seat in Section 12 which was nearest to Section 10 or farthest away from Section 10?

A. Farthest seat, the seat facing east.

Q. Section 12 and Section 14 are adjacent one to the other?

A. Yes, no, 11 I would say, or 12.

Q. Withdraw that, I am confusing everyone here by referring to the wrong numbers. Section 12 and 10 are adjacent? A. Yes.

Q. In moving the overnight bag, the small one, and in putting that in Section 12, do you know whether it was placed on the seat nearest to Section 10 or farthest away from 10?

A. Farthest away.

Q. It was placed farthest away from Section 10?

A. Yes.

Q. Did your mother sit down in Section 12?

A. Yes.

Q. In what seat?

A. The seat closest to Section 10.

Q. The seat closest to Section 10? A. Yes.

Q. Those facts are clear in your mind?

A. Yes.

Q. Where were your coats placed?

A. Well, as I say, I put my coat on top of the overnight case.

(Testimony of Marjory Harrington.)

Q. The coats would also be on the seat in Section 12 farthest away from Section 10? A. Yes.

Q. You yourself, did you sit down in Section 10 or Section 12? A. No.

Q. You left immediately after your mother was seated? A. Yes, sir.

Q. So you never had sat down in Section 10 or 12? A. No.

Q. As a matter of fact, you hadn't sat down in the car? A. No.

Q. When you left, the train was in motion?

A. Yes.

Q. You first went to the ladies' rest room?

A. Yes.

Q. In that car? [132] A. Yes.

Q. Do you know which end of the car it was in?

A. It was the end closest to our seats, I believe.

Q. The end closest to your seats?

A. I believe, if I recall correctly.

Q. That is your recollection, at least?

A. That is my recollection.

Q. You are not positive as to that?

A. No, I am not.

Q. Was the ladies' rest room unlocked at that time? A. Yes.

Q. And available for use? A. Yes.

Q. You spent some time there?

A. Yes, I would say 10 minutes.

Q. Then I understood you left that car and went to some other car?

(Testimony of Marjory Harrington.)

A. Yes, I went then to the observation car.

Q. By the observation car do you mean the car at the extreme rear of the train, or the club car?

A. No, the observation car at the rear end of the train.

Q. At the rear end of the train? A. Yes.

Q. After you left the rest room in the car before you went to the observation car, did you return to Section 12 to see how [133] your mother might be located?

A. No, because I knew Mother was capable of taking care of herself. As I say, I thought the porter would get her placed and get her a pillow because the porter was there when I left. When I returned, nothing had been done.

Q. You yourself made no effort to see she had been properly established?

Mr. McCaffery, Jr.: Objected to as not proper cross-examination.

Court: Sustained.

Q. In going from the observation car to the rest-room, did you pass your mother's section?

A. No.

Q. And approximately how many cars did you go through in passing from 16 to the observation car?

A. It might have been three or it might have been two.

Q. Three or two? A. Yes.

Q. Were they sleepers?

(Testimony of Marjory Harrington.)

A. I believe one was the club car and I believe one or two were sleepers.

Q. One was a club car? A. Yes.

Q. Where was that located with respect to car 16 or A, if you know? [134]

A. I couldn't say if it was the next car or if there was a car between.

Q. It is your recollection it was between car A and the other car? A. Yes.

Court: Car A-16.

Mr. Pauly: To avoid confusion, 16 was merely another additional number to designate the train, Train No. 16. Car A or Car B, Train 16. Sixteen designates the train.

Q. It is your recollection that the club car was between car A and the observation car?

A. I believe so.

Q. What were the other coaches that you passed through, if you recall?

A. They were sleeping cars.

Q. Did you pass through a diner? A. No.

Q. You did not? A. No.

Q. Now, to make one thing clear as to this time element, I understood you to say that you had been reading? A. Yes.

Q. It was approximately 20 minutes between the time when you got to the observation car and the time when the conductor picked up your tickets?

A. Yes.

Q. You had previously spent some 10 minutes or more in the restroom of the car? A. Yes.

(Testimony of Marjory Harrington.)

Q. So that would be approximately a half hour from the time you left your mother and the conductor picked up the ticket? A. Yes.

Q. Then, it was some 10 or 15 minutes after the conductor picked up the tickets you say the lady came?

A. I wouldn't be positive, because as I say, when you are reading a book, you aren't conscious of anything else but the book in front of you.

Q. You spent all that time in the observation car reading? A. Yes.

Q. Do you know the lady that came back?

A. No. I just had noticed her. She was occupying our section when we got on.

Q. It was the same lady?

A. The same lady, yes.

Q. After you returned to car A and Section 12 where your mother was then seated, was she seated in the same seat where you left her? A. Yes.

Q. Was the conductor there at that time?

A. He came almost immediately, I think, while Mother was telling [136] me of her accident.

Q. From what direction, do you know?

A. I couldn't say, no, I was too interested in listening to Mother.

Q. One or two men?

A. Two conductors and the passenger agent.

Q. Three men? A. Yes.

Q. No porter? A. No.

(Testimony of Marjory Harrington.)

Q. Did you pass the porter in going from the observation car to your mother's car?

A. No, I did not.

Q. After the conductors arrived there in Section 12 following the accident, how long were they there, do you know before leaving?

A. Do you mean how long were they talking there to me?

Q. Yes.

A. Not more than five minutes at the most, just took Mother's name and address and my name, and turned to the other passengers and asked if any of them had seen her fall. There were few people on the car even though we had difficulty getting reservations.

Q. Other people on the car?

A. Not very many. [137]

Q. There were not very many in the car?

A. No.

Q. Do you have any idea how many?

A. I wouldn't say there were more than a half-dozen. There was a man and woman in Section 9 who could have seen her fall. Evidently they were the ones who helped pick her up.

Q. You weren't there, of course? A. No.

Q. You didn't see the accident at all?

A. But I asked them if they had seen her fall, and they said—— (interrupted).

Q. I don't care what they may have said. Thank you. That is all.

(Testimony of Marjory Harrington.)

Redirect Examination

By Mr. Myers:

Q. Miss Harrington, you have testified that the porter moved the overnight bag from the adjoining section in which your mother was seated and by which you were waiting? A. Yes.

Q. To the seat in Section 12 furthest away from that adjoining section? A. Yes.

Q. Was this seat in Section 12 to which the overnight bag was moved facing in the same direction the car was going? [138] A. Yes.

Q. Or facing away?

A. Facing the same direction. It was facing east.

Q. In direct and cross-examination you have given various measurements of time as to the time you spent in the rest room and in the observation car? A. Yes.

Q. Were they accurate measurements of these times?

A. No, I did not have my watch with me. I think Mother's watch, the night before it wasn't running right or something, she had put that in her pocket-book.

Q. They were general estimations of time, is that correct? A. Yes.

Mr. Myers: That is all.

(Witness excused.)

(Five-minute recess.)

Mr. McCaffery, Jr.: I would like to recall Dr. Kane at this time for a question or two I forgot to ask on direct examination.

Court: Very well.

P. E. KANE

recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination

By Mr. McCaffery, Jr.:

Q. Doctor, you are the same witness who testified yesterday afternoon on behalf of the plaintiff?

A. Yes.

Q. You were sworn at that time?

A. Yes, sir.

Q. Doctor, handing you Plaintiff's Exhibit Number 1, that is the X-ray plate which you testified you had prepared under your direction?

A. Yes, sir.

Q. Doctor, I forgot to ask you yesterday, could you demonstrate to the jury the position of the stone in the kidney from that X-ray plate?

A. Of course, on reading plates, there is just shadows, but here it is on this side here, this area in here (indicating). It is opaque, something like a bone right at the pelvis shown on this side here. You can compare it. There is no such mass on the left side whatsoever. The outline of that is up that way and down (indicating).

Q. And, Doctor, what is the position of the stone in the kidney? Could you describe whether it is at

(Testimony of P. E. Kane.)

the top or bottom or the opening of the pelvis sac?

A. It is in the pelvis of the kidney. Taking the kidney from top to bottom, it would be about the middle in comparison with [140] the kidney, that is, on the edge.

Q. Doctor, when that condition is found to exist, what is the customary care required? Is surgery indicated? A. Yes.

Q. If surgery is impossible or cannot be resorted to, Doctor, what is the usual result where a stone is permitted to remain in the, what you refer to it, the pelvis of the kidney?

A. It will impinge upon it, the kidney substance in time, and tend to destroy it as time goes on.

Mr. McCaffery, Jr.: That is all. Thank you, Doctor.

Cross-Examination

By Mr. Pauly:

Q. That is assuming it continues to grow and is of sufficient size? A. Yes, sir.

Q. Otherwise, it might be present and if it becomes dormant, it might never cause any difficulty?

A. That's right.

Court: What is the size of the stone now with relation to the pelvis sac?

A. I would say it pretty nearly fills it at the present time, comparing the shadow with the size of the normal pelvis of the kidney.

Mr. Pauly: That is all.

(Witness excused.) [141]

NORMAN HAMILL

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCaffery, Jr.:

Q. Mr. Hamill, would you please state your name? A. Norman Hamill.

Q. What is your business or occupation?

A. I am an architect.

Q. Where did you receive your college education? A. Montana State College.

Q. Did you receive a degree at the end of your college work? A. Yes.

Q. What was that degree?

A. Bachelor of Science in Architecture.

Q. As an architect, Mr. Hamill, do you have occasion to pass upon the suitability of materials for use in structures? A. Yes.

Q. Among such materials, do you have occasions to pass upon the placement of rugs and asphalt tile and other materials in places occupied by the public? A. Yes.

Q. How long have you been in the practice of your profession, Mr. Hamill?

A. Oh, about 15 years, 16 years. [142]

Q. You were duly licensed in the State of Montana as an architect? A. Yes, 1935.

Q. At this time you hold your license?

A. Yes.

Q. Mr. Hamill, would you be able to express an

(Testimony of Norman Hamill.)

opinion as to the footing given by a heavy rug, wool rug, contrasted with the footing given by asphalt tile?

Mr. Garlington: Just a minute, your Honor, I should like at this time to enter an objection to this testimony for the following reasons: that it is incompetent, irrelevant and immaterial; that there is neither an allegation nor any evidence that the floor condition of the car in question was the proximate cause of plaintiff's injury. May I interrupt here? I assume this evidence is offered in connection with the condition of the Car A-16, is that right?

Mr. McCaffery, Jr.: That is correct, it is proposed to be offered.

Mr. Garlington: Further that a failure to provide adequate facilities for the accommodation of hats and coats of passengers is not a reasonably foreseeable cause of physical injury to passengers, particularly when adequate porter service is available; that there is neither an allegation nor evidence in this case to sustain an attack on the design, planning and construction of the Touralux car such as A-16, such matters [143] not being subject to a review by a jury; that the evidence with respect to the design, planning and construction of such cars can be furnished only by expert opinion evidence of those qualified in that field. There is no foundation laid here showing that the witness of whom the question is asked is qualified as an expert in that field, and there is insufficient foundation of fact laid

(Testimony of Norman Hamill.)

for the opinion which it is sought to be obtained from this witness.

Mr. McCaffery, Jr.: We believe, if the Court please, that the allegations of the complaint and the evidence which has been received in court without objection has definitely established a condition upon which we think the jury should be provided with some expert testimony, in connection with the security of the footing provided by the defendant in places where it should have anticipated that persons might be in the act of hanging up coats when sudden movements of the car would take place; that they have failed to exercise the highest degree of care. The only question in my mind as to the admissibility of such evidence is as to whether or not it wouldn't be within the common knowledge of all jurors, and whether or not expert testimony is required upon the points.

Court: Counsel seems to have made no objection upon that ground as I understand the objection.

Mr. Garlington: Our objection is based upon the fact that, as we understand the issues in this case, your Honor, the complaint [144] alleges and evidence was offered to prove that the planning, design and furnishing of the car is faulty in that it does not provide adequate and safe facilities or accommodations for the hats and coats of passengers on the car. Our position is that we are at a loss—an attack of that kind upon the problem of railroad engineering, planning and design may not be made

(Testimony of Norman Hamill.)

in court subject to a review by the jury as to the adequacy of those facilities, and that would be true, your Honor, whether the testimony on behalf of the plaintiff is supported by the opinion such as called for from this witness, or whether it is based on the simple facts as they already appear from the description of the area, that there was a floor, part of which was carpeted and part of which was not. Our objection is to the attack on the design and planning of the car.

Court: Well, it isn't an attack upon the design and planning of the car, as I see it. The purpose of the testimony is to elicit testimony as to the nature and safety of the flooring furnished, is that it?

Mr. McCaffery, Jr.: That is our attempt, your Honor.

Mr. Garlington: That we consider to be an attack on the design and planning of the car because there is no contention that the Touralux car was not in the designed and planned condition. In other words, there is no testimony here that this particular bit of flooring in Section 12 was in bad order, or [145] out of the condition which was prevailing throughout the car.

Court: I think I will have a discussion with counsel on this point.

(The jury was admonished at this point and left the courtroom, and in the absence of the jury, argument was had upon the objection.

(Testimony of Norman Hamill.)

(Thereafter, a recess was taken until 2:00 o'clock, p.m., same day, October 20, 1949, at which time the following proceedings were had, still in the absence of the jury:)

Court: I think upon proper objection, I will sustain an objection to the offering of expert opinion in the matter at all, but not upon the basis you have suggested, but rather that this is not a matter subject to expert opinion, that the jury is just as well qualified as anyone else to find whether or not the footing was safe, whether negligence existed under the circumstances, as well qualified as an expert. We are all too familiar with our own experience as to that. It is something we are aware of every day in our own experience, and the jury too. So, if the defendant will make an objection to that testimony based upon that basis, I will sustain such an objection.

Mr. Garlington: Before I do that, your Honor, may I ask—I would not like to waive the objection to the submission of that issue to the jury by making objection to the admission of expert evidence on the point.

Court: Oh, of course not. Your objection will stand. The objection you have made stands, and I will sustain it only [146] upon the basis that expert opinion is not admissible in this particular matter.

Mr. Garlington: Then, let the record show that without prejudice to the objection heretofore made by the defendant to the admissibility of evidence on

(Testimony of Norman Hamill.)

this subject, the defendant now has the opportunity to make an additional objection to the introduction of any expert opinion evidence on the issue of the condition of the floor for the reason and on the ground that such is not a proper subject of expert opinion evidence.

Court: Very well, the Court will sustain the objection on that basis, on the basis it is not proper subject for opinion evidence.

Mr. Pauly: And overrule it as to the balance, your Honor?

Court: It isn't necessary to overrule it. I am just advising you what my position is. I am sustaining it upon that basis alone. As the matter moves along, make your proper objection at any time, but I am just advising you about my position in the matter.

Mr. McCaffery, Jr.: At this time may the witness Mr. Hamill be permanently excused.

Court: Yes.

(Witness excused.)

Mr. Caffery, Jr.: Further, the plaintiff rests his case at this time. Before resting, we would like to make a motion in conformity with Rule 15(b) of the Code of Civil [147] Procedure as to amendments to conform to the evidence, and I thought, perhaps, it might be better to do so in the absence of the jury.

Court: Very well.

Mr. McCaffery, Jr.: The plaintiff proposes that her complaint be amended to conform to the evidence as produced upon the plaintiff's case, and particularly that Paragraph 4 of plaintiff's complaint include the following allegation of negligence as proved by the evidence and be designated as paragraph (e).

Court: Paragraph (e), following the enumeration.

Mr. McCaffery, Jr.: Following the enumeration of issues of negligence.

Court: On page 4, yes, I see. .

Mr. McCaffery, Jr.: As follows: That the defendant, in the exercise of the highest degree of care knew, or should have known, that injuries were liable to be sustained by passengers, and particularly this plaintiff, because of the insecure footing provided by the defendant in its Touralux coaches in those portions thereof covered by a hard surface composition, namely, that portion between the seats provided for occupancy of passengers and particularly should have anticipated injuries to a passenger standing upon such hard surfaced material when the train lurched, swayed, or gave an unusual, unexpected or violent jerk. Secondly, that the complaint in paragraph 5, covering [148] the injuries received by the plaintiff, be amended to include subsections (h) and (j), as follows: (h), an infection of the pelvis of the kidneys; (j) a calcification in the pelvis of the right kidney, resulting in a kidney stone of large size. I believe that is the amendments

at this time that we have to conform to the evidence *procuded* at the trial of this cause.

Mr. Garlington: Defendant would like to be informed now whether this amendment is intended to eliminate from the further issues in the case allegations of negligence in paragraph 4 on which there has not been any evidence up to this point. I refer particularly to paragraph 4 (a), concerning duplication of space and paragraph 4 (c) concerning the public address system.

Mr. McCaffery, Jr.: No proof having been adduced at the trial as to the allegations contained in paragraph 4(c) relative to a public address system, the plaintiff, as to that portion thereof charging negligence in failing to warn the plaintiff, although the car in which the plaintiff was riding was equipped with a public address system provided for such purpose, is abandoned by the plaintiff, but as to that portion of paragraph (c) containing an allegation that there was a failure to notify or warn the passengers and particularly this plaintiff that the train was about to start, we still contend that proof has been made by the testimony of the plaintiff on direct examination [149] when she stated that no person, conductor, porter, or otherwise, warned her that the train was about to start. Is that in answer to your question, Jim? As to paragraph (a), we still rely and contend that proof of occupancy and inability to occupy the section for which she had contracted with the defendant company has been made, and that that may be an issue of con-

curing negligence and negligence contributing to the plaintiff's injury under the theory of causation. Further, that the proposed amendment does not, in any way, other than herein stated, abandon any of the other designated grounds of negligence contained in the complaint.

Mr. Garlington: The defendant objects to the amendment of the plaintiff's complaint at the close of the plaintiff's case by including a general allegation dictated into the record as paragraph 4(e) for the reason that it enlarges the issues in the complaint and leaves the defendant without opportunity to produce adequate testimony to meet that issue, the enlargement being that in the original complaint, by paragraph 4(d), the allegation was that the defendant failed to provide proper facilities for the accommodation of the plaintiff's hat and coat, and our proof has been formed around meeting that sort of a contention. Now, a new issue is injected as to why, if at all, the hard surfaced composition floor is provided in the Touraltux coaches, and whether on that issue injury should have been anticipated, and that it may, perhaps, be evidence of a [150] violation of the duty owed to the plaintiff without any opportunity to consider it or to assemble evidence on that issue. The defendant objects that the amendment comes too late and for that reason should be not allowed.

Court: Mr. Garlington, doesn't subsection 2 of section (d) set forth the slippery and unsafe condition of the floor?

Mr. Garlington: It does, but it relates it and confines it to the business of providing for the accommodation of hats and coats, and it was our view that, frankly, that issue wasn't sound as a matter of law, and we proposed to base our defense, or, I should say, risk our defense on that proposition. Now, when the whole field of what kind of flooring should be had in a car of this type is opened up, just at the close of the plaintiff's case and when we have but a few hours within which to put in ours, it leaves us in a very difficult position.

Court: What was your position with reference to the allegation that was originally in the complaint?

Mr. Garlington: Our position with respect to that was that negligence in failing to provide for accommodation of hats and coats just couldn't have been the proximate cause of this injury. In other words, that failure to provide some sort of accommodations for hats and coats did not have a reasonably foreseeable consequence that it might result in physical injury to passengers under conditions as they are in that train. I still think that is the law, and the floor was just related to [151] hats and coats, and I frankly——(interrupted).

Court: Of course, it was related as concurrent negligence, wasn't it. Doesn't the allegation make it a concurring act of negligence? And any one of the concurring acts is negligence.

Mr. Garlington: I don't so interpret the complaint.

Court: I think it is sufficient, enough to put you on guard. It may be it couldn't have been submitted to the jury on that point under the pleading at this point without amendment, but surely it was sufficient to put you on guard as to the proposition. Of course, I take that attitude because I, in my own mind, just looked at it and thought it was a slippery floor case.

Mr. Garlington: We looked at it carefully. This is done with obvious—the paragraph enumerates classifications (a), (b), (c), (d), then under (d), which is the paragraph we are discussing, there are two subdivisions, which in any arrangement or analysis revert back to (d), so we thought that was the issue we were going to face. As I say, we thought we could take that one on the law rather than try to produce evidence with respect to it.

Court: Doesn't that paragraph allege there was negligence in the failure to provide facilities to hang hats and coats, then doesn't it also allege there was negligence in furnishing a slippery floor? [152]

Mr. Garlington: I don't think so, your Honor, because it says defendant didn't provide for hats and coats because of the following defects, one and two. That is the frame work of it.

Court: It says the facilities were inadequate and unsafe, the facilities furnished for the hanging of hats and coats were inadequate and unsafe because the floor was slippery? That is what it amounts to, doesn't it?

Mr. Garlington: I don't think so, your Honor,

I think it says we were negligent in failing to provide proper facilities for the accommodation of the hats and coats, and we knew, or should have known that the facilities so provided—that means for hats and coats, as I understand—were inadequate and unsafe because—were in an unsafe condition to be used while the train was in motion or being put in motion because of the following defects, all relating to hats and coats.

Court: It alleges the facilities furnished were inadequate to be used because the floor was slippery. Now, surely that was enough. What is your position now, though, accepting your statement that you were not advised, didn't feel that this was a question to be considered, what can you do to proceed with the trial within any reasonable time now?

Mr. Garlington: I don't know. The office of the railroad that would have to do with these things is, of course, in Chicago. If the interpretation of paragraph (d) is as your [153] Honor indicates, then there is just no need to include a paragraph (e) because (e) is included in (d).

Court: My offhand opinion was that it is. I don't know that the amendment was necessary.

Mr. McCaffery, Jr.: May I state the position of the plaintiff in connection with it? It was our interpretation of the drafting of the complaint that previously in paragraph 4, in describing the activities which had taken place, we've alleged that "and while in the act of hanging up her hat, the train upon which the plaintiff was riding was violently

and suddenly jerked and put into motion by the employees of the defendant without any notice or warning whatsoever." Now, continuing on down, the complaint states that the negligent acts and omissions of the defendant corporation, its servants and employees, which proximately caused the plaintiff's injuries were as follows. Under any interpretation, the allegation of the motion of the train was an allegation of a contributing cause, and the proof has so developed that we now believe that the contributing cause has become a concurring and proximate cause from the evidence adduced at the trial. There is no question of lack of notice on the part of the defendant. The complaint actually puts them on notice that the train was suddenly started, put into motion with a sudden, unusual jerk. That is alleged as a contributing cause. Where are they taken by surprise from changing a contributing cause to a proximate [154] cause as it developed by the evidence adduced at the trial?

Court: I don't see it. I think the unusual jerk or whatever words are used to allege the movement, and the failure to provide adequate facilities for hanging hats and the slippery condition of the floor, the slippery floor that was furnished, are all each contributing or concurrent acts of negligence, and any one of them is sufficient. I think, don't you find, Mr. Garlington, that the allegation with reference to the slippery condition of the floor—what did you have in mind when you read that?

Mr. Garlington: We had in mind it related back

to the business of hats and coats and raised the problem of foreseeability and proximate cause.

Court: The slippery floor didn't have anything to do with whether or not facilities were provided for the hanging of hats and coats, but surely the slippery floor had something to do under the allegations with whether or not the facilities furnished for hanging hats and coats were adequate and safe, considering where they were located and the fact you would have to use the slippery floor to reach them. Wouldn't that be a part of the whole picture as you would get it? In other words, it is alleged it was unsafe because you had to stand on the slippery floor to hang hats and coats.

Mr. Garlington: We may not have interpreted it correctly.

Court: Looking at it now, do you see it. [155]

Mr. Garlington: I see there can be made a connection now.

Court: I appreciate your position, too.

Mr. Garlington: I think that elevates what seemed to be one of the minor allegations of negligence to one of major importance on its own.

Court: Yes, separately. What can we do now to assist you? Can we adjourn for the rest of the day?

Mr. Garlington: I think we might as well go ahead and complete as much of the case as we can this afternoon and we will undertake in the meanwhile to see what can be done to remedy our situation and then take it up with the Court in the morning.

Court: Very well, call in the jury. Did I grant leave to make the amendment? Leave is granted to make the amendment offered.

(Jury returns to the Courtroom.)

Court: Do you wish to make a statement? [156]

* * *

DONALD H. CAMPBELL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pauly:

Q. State your name, please.

A. Donald H. Campbell.

Q. Where do you live?

A. Seattle, Washington.

Q. Are you employed by the Milwaukee Railroad?
A. Yes, I am.

Q. In what capacity?

A. Chief Clerk, Reservation Bureau.

Q. At what points are you so employed?

A. I don't understand.

Q. In what city?

A. In Seattle, Washington.

Q. In the Seattle office of the Milwaukee Railroad?
A. That's right.

Q. Will you please tell us in general what is the Reservation Bureau?

A. The Reservation Bureau is a private office run under the jurisdiction of the City Ticket Office,

(Testimony of Donald H. Campbell.)

and we are engaged in making reservations by wire and by phone.

Q. For sleeping accommodations? [159]

A. Sleeping accommodations and coach.

Q. And coach accommodations as well?

A. That's right.

Q. In that service, do you handle the assignment of Pullman space and tourist space together?

A. Yes, we do.

Q. Is it a fact, Mr. Campbell, that on any train and on Train 16, that some space in each car may be assigned specifically to various points?

A. That's right.

Q. And it is sold by those stations without checking with you?

A. That's right. That is their permanently assigned space.

Q. Would the Seattle office sell that space so assigned specifically to a station? A. No.

Q. But as to all unassigned space, the reservations are handled through your office?

A. That's right.

Q. As Chief Clerk in the Reservation Bureau, do you have general supervision over such Reservation Bureau? A. Yes, I do.

Q. Now, let me ask you, were you acting as such Chief Clerk in August, 1947? A. I was. [160]

Q. And as such, did you have supervision over assigning space in Touralux car A-16, leaving Seattle on August 26, 1947?

(Testimony of Donald H. Campbell.)

A. Yes, that's right.

Q. I see you have available there with you certain documents? A. That's right.

Q. Will you tell me, are they documents from your office? A. That's right.

Q. Constituting part of your official records?

A. That's right.

Q. Will you tell us, either relying on your own personal recollection, or those documents, official records, so far as you have to, what if any sale was made of Section 12 in Car A leaving Seattle on Train 16, August 26, 1947?

A. To begin at the beginning, on August 13th, we received a wire from our agent at Deer Lodge, Montana, requesting space on Deer Lodge to Chicago.

Q. Excuse me for interrupting. What do you mean, "on Deer Lodge to Chicago"?

A. The space was requested for the party to get on at Deer Lodge and go to Chicago, and we assigned by wire lower 12, Car A-16. On August 19th, we received a Western Union wire from our agent, Mr. A. Tansley, at San Francisco, at the request of the Southern Pacific Agent at Marysville, for space on Seattle to Butte. Inasmuch as at that time lower 12 had been assigned on Deer Lodge and was the only space available, [161] we assigned to our agent, Mr. Tansley Section 12, Car A-16, to Deer Lodge only, under his Code VH 554. On August 20th, we received a wire from our agent at Deer Lodge—(interrupted).

(Testimony of Donald H. Campbell.)

Q. Let me interrupt at that point. Section 12, as I understand, had been sold then to the agent in San Francisco? A. That's right.

Q. For use from Seattle to Deer Lodge, and from Deer Lodge on, to another party for occupancy on Deer Lodge to Chicago?

A. That's right. On August 20th, we received another wire from our agent at Deer Lodge, requesting that we cancel the space assigned him on Deer Lodge to Chicago, which we did. This left the space open from Deer Lodge on. Sometime after that, the space was re-assigned on Three Forks under Ticket 1034 to Chicago.

Q. The assignment was made to Agent Tansley, was it? A. Yes.

Q. In San Francisco, for occupancy from Seattle to Deer Lodge. Do you know if that was intended for sale to someone at Marysville, California?

A. I would know by the code number because each office has its own separate code letters. If I didn't know it from memory, I could check it.

Q. Do you know it from memory?

A. Yes, in this case.

Q. What is it? [162]

A. VH is the code at Marysville.

Q. That space was later picked up and definitely sold to Marysville from Seattle to Deer Lodge?

A. When that code number, the VH 554, when they inserted that code number in the diagram, then it is, it is sold.

Q. Was any other sale made of Section 12 on

(Testimony of Donald H. Campbell.)

that train for that day between Seattle and Deer Lodge?

Mr. McCaffery, Jr.: Just a minute, to which we will object on the ground and for the reason it is calling for a conclusion of the witness; there is no showing, no proper foundation laid or no showing made that this witness is in complete charge, or knows of his own knowledge that a sale has not been made or was not made by a conductor on the station or on the platform. The evidence is self-serving, it is based upon what the witness has described as the custom of the railroads in the sale and distribution of tickets; for the further ground and for the further reason that the basis for his answer is hearsay; that none of the telegrams which are purported to have been received have been produced in evidence as the best evidence, although objection was not made at the time by the plaintiff.

Mr. Pauly: If I may interrupt. To shorten matters, I intend to withdraw the question to save time going on with the objection.

Mr. McCaffery, Jr.: All right. [163]

Q. So far as your office is concerned, Mr. Campbell, can you tell us whether or not any other sale of Section 12 on that particular train for that day was made leaving Seattle?

A. So far as our office is concerned, no, there was no other sale.

Q. Is it possible—I am not asking you whether it did in fact occur—but would it have been possible

(Testimony of Donald H. Campbell.)

for a ticket agent, not in your office, but elsewhere on the line, to have sold a ticket for occupancy of Section 12 on that train leaving Seattle that day?

Mr. McCaffery, Jr.: Just a minute. To which we will object on the ground and for the reason the question calls for conjecture on the part of the witness. There is no reason to say that this witness can testify whether or not an agent or ticket salesman in any of their offices might have made a mistake.

Mr. Pauly: That is what I am trying to get at, your Honor. I want to find out if a mistake could occur.

Mr. McCaffery, Jr.: I will withdraw the objection.

Court: Very well, answer the question.

A. I would say it is impossible because the agent or ticket seller would have to call or wire us to secure space before he could sell it.

Q. Of course, the ticket agent might have failed to do what he should have done? [164]

A. That is true.

Q. That would be the only way that it could have occurred, any duplication of sale?

A. That's right.

Q. But recognizing that is at least a possibility?

A. That is a possibility, yes.

Q. Let me ask you this then: If such a duplication of sale by some ticket agent in contravention to your practice and rules had in fact been made,

(Testimony of Donald H. Campbell.)

does your company practice require that a report of such duplication in sale be made to your office?

A. Very definitely.

Q. Did your office at any time ever receive from any source whatsoever a report of duplicate sale having been made of Section 12 on Train 16 for occupancy, leaving Seattle August 26, 1947?

A. No, sir.

Q. Do you also in your office, Mr. Campbell, quote rates on various space? A. Yes, we do.

Q. Are you generally familiar with rates charged for various space on Train 16?

A. Yes, I am.

Q. In general, will you tell us what, if any, different types or classes of transportation are available on Train 16?

A. Train 16 carries three classes of transportation. [165]

Q. Three classes of transportation. What are they?

A. Coach, which is the most economical and involves only a reserved coach seat. The next class is what we call Touralux. It is an intermediate class. It entitles one on an intermediate ticket to purchase a berth, either upper or lower; and we have the first class, which is Pullman, standard. That is the highest, most expensive rate, and also on the ticket, it entitles one to purchase a room, a roomette or bedroom.

Q. For transportation in coaches, how many tickets are required?

(Testimony of Donald H. Campbell.)

A. One ticket and one coupon for the coach seat reserved, but that is not a ticket.

Q. Is any charge made for the seat?

A. No.

Q. Just for the transportation? A. Yes.

Q. How many tickets are required for transportation in the tourist section?

A. Two tickets.

Q. Will you explain what they are?

A. The rail ticket which is sold at the intermediate rate, plus the charge and ticket sold for the berth.

Q. I take it, the rail transportation charge for tourist passengers is more expensive than for day coaches? A. Yes, it is. [166]

Q. Of course, there is no charge for day coaches corresponding to the sleeper space?

A. That's right.

Q. In the Pullman space, how many tickets are required? A. Two again.

Q. What are they for?

A. That is for the rail and for the Pullman space occupied. In the case of the Olympian Hiawatha, No. 16, it would be a roomette or bedroom.

Q. How does that compare with the corresponding rates for tourist passage?

A. Higher. It is the most expensive form.

Mr. Pauly: That is all.

(Testimony of Donald H. Campbell.)

Cross-Examination

By Mr. Myers:

Q. How long have you worked for the Milwaukee Railroad? A. Approximately five years.

Q. Have you been employed in the Reservation Bureau all during that time?

A. No, I originally was Reservation Clerk in Minneapolis. I was transferred to Seattle where I was Reservation Clerk for two months. From then on, I was ticket seller in the Seattle City Ticket office until June 1, 1947, when the Reservation Bureau was formed. Since then I have been Chief Clerk of the [167] Reservation Bureau.

Q. What are the duties of Reservation Clerk?

A. A Reservation Clerk answers phones, gives out information as to schedules, rates, makes itineraries and assigns space on the diagrams.

Q. The Reservation Bureau to which you have referred was organized in June, 1947?

A. That's right.

Q. Was one of the purposes of that Bureau to eliminate the duplications of sales?

A. Not necessarily. We had reservations taken care of in the Seattle City Ticket Office but with the addition of the new streamline train and the extra business involved, it was deemed necessary to move it out of the ticket office and into a room by itself where it could function more efficiently.

Q. When did the streamliner start to run from Seattle? A. June 29, 1947.

(Testimony of Donald H. Campbell.)

Q. It was at that time the Reservation Bureau was first set up? A. It was set up June 1st.

Q. You have stated that there might be a duplicate sale of tickets if a ticket seller failed to call or wire to secure the space? A. Yes.

Q. That is correct. Wouldn't it be possible, also, Mr. Campbell, [168] for a ticket by mistake to be written out for a particular section although the actual section reserved were some other number?

A. That could be an error, yes.

Q. In other words, the ticket seller is a human being just like the rest of us and they could make a mistake in writing out numbers on a particular ticket? A. That is true.

Q. You have stated that it is a rule of the railroad that where there is a duplicate sale of tickets there should be a report, is that correct?

A. There always is.

Q. So there have been instances of duplicate sales of tickets? A. Yes.

Q. I mean in spite of the system that is set up in the attempt to cut them, do duplicate sales of tickets for sections occur? A. That's right.

Q. And it would also be possible, would it not, Mr. Campbell, for an error to be made in seating passengers holding a particular ticket, so that by mistake they were placed in some other section than that for which their ticket called?

A. Well, the porter, when he puts them on the

(Testimony of Donald H. Campbell.)

train, will check their space and seat them in that section or berth.

Q. He would look at their ticket, is that correct?

A. Either that, or he will ask as to the space they are holding and escort them to the space.

Q. It would be possible for a mistake to be made in securing that information so that an individual could be seated at first in a space other than that for which he had bought a ticket, isn't that just another human error that could possibly occur?

A. Yes, that is possible.

Mr. Myers: That is all.

Mr. Pauly: That is all.

(Witness excused.)

THOMAS FRANCIS NOLAN

called as a witness on behalf of the defendant, having been previously sworn, testified as follows:

Direct Examination

By Mr. Pauly:

Q. Mr. Nolan, you testified here previously, did you not? A. Yes, sir.

Q. You were sworn at that time?

A. That's right.

Q. You stated you were the sleeping car conductor on Train 16 leaving Seattle August 26, 1947?

A. That's right.

Q. Reference has been made here and you have heard reference made to an accident sustained on

(Testimony of Thomas Francis Nolan.)

that train by Mrs. Harrington. [170] Did you, at any time, learn of that accident prior to your attendance in Court? A. Yes, sir.

Q. How did you first learn that Mrs. Harrington had been in an accident?

A. I heard it directly from Mrs. Harrington at the time I was picking up her ticket.

Q. On that train? A. On that train, sir.

Q. What time did that train leave Seattle, do you know? A. 2:45 p.m.

Q. What did you do, if anything, immediately after the departure of that train from Seattle?

A. I started to collect my tickets.

Q. Where did you start?

A. In Car B, B-16.

Q. Will you tell us where B-16 was located in the train on that day?

A. Car B-16 is directly behind Car A-16, that is, looking forward on the train.

Q. How many Touralux cars did you have in the train on that day? A. I had three.

Q. B and A and what other? A. F, F-16.

Q. Will you describe to us—you have indicated B was immediately behind A?

A. That's right.

Q. Where was Car F located?

A. F, immediately before A.

Q. So that from the rear going forward, the cars would be located in the order B, A and F?

A. That's right, sir.

(Testimony of Thomas Francis Nolan.)

Q. You started picking tickets in Car B?

A. Yes, sir.

Q. In what end of Car B?

A. The rear end of the car B.

Q. Is that your usual practice?

A. Yes, sir.

Q. Is there a reason for that?

A. Yes, there is a reason as far as I am personally concerned. I have always started picking tickets up there and then working forward on the train, working each car in succession. Then, generally, by the time I complete the lifting of the tickets of the three Touralux cars, as a rule, I will meet the train conductor, to whom I turn over the railroad tickets.

Q. Do you collect tickets in day coaches?

A. No, sir.

Q. Who does? A. The train conductor.

Q. He does that while you are collecting tickets in the Touralux? A. Yes, sir.

Q. You work toward each other?

A. That's right.

Q. You meet generally at the end of the day coaches or forward end of the Touralux coaches?

A. As a rule.

Q. On this particular occasion, do you remember whether or not you did begin the collection of tickets in the Touralux cars at the rear end of Car B?

A. Yes, sir.

Q. And worked forward?

A. That's right, sir.

(Testimony of Thomas Francis Nolan.)

Q. Had you completed the collection of tickets when you first learned of Mrs. Harrington's accident? A. No, sir.

Q. How far had you gotten in the process of collecting tickets?

A. I had completed Car B and that part of Car A up to Mrs. Harrington's section.

Q. Will you describe to us what the arrangement of the Touralux car with respect to the placement of berths is and the general practice with respect to the placement of low numbered sections in any particular portion of a car with respect to the motion of the train, the low numbered berths? [173]

A. The low numbered berths are to the rear of each car. Does that answer your question?

Q. Yes. Is that customary?

A. That is always the rule so far as those cars are concerned, at least.

Q. Are Touralux cars so designed that the low numbered berths are adjacent to the ladies' rest room?

A. No, the low numbered berths are adjacent to the men's lounge.

Q. The men's lounge? A. Yes, sir.

Q. The high numbered berths are forward?

A. Yes, sir.

Q. And the men's room is ahead of them?

A. No, the ladies' room.

Q. With respect to the motion of the train, can you tell us how the even numbered and the odd numbered berths are divided in the car?

(Testimony of Thomas Francis Nolan.)

A. In respect to the direction of the train, did you say?

Q. Yes.

Q. Looking forward in the car, the odd numbers are to the right and even numbered berths are to the left, that is, of the middle aisle.

Q. Is there any particular reason for operating the car in that position with the high numbers to the front end of the car?

A. I don't know of any, sir. I don't think I know of any [174] reason for it.

Q. But is that uniform practice?

A. Yes, sir, on that train. I am referring to these cars, of course.

Q. So that in Car A, as you were picking up the tickets, did you start at the high or low berths?

A. Low berths.

Q. And worked on up? A. Yes, sir.

Q. You had reached Section 12?

A. That's right.

Q. You say you then learned of Mrs. Harrington's accident from her? A. That's right.

Q. How did she inform you of the accident?

A. I asked her for her ticket. She told me, "I have been hurt, I fell."

Q. What did you do, if anything?

A. At that time I just dispatched the porter for her daughter. I think Mrs. Harrington herself, or somebody told me her daughter was on the train with her. I sent the porter for Miss Harrington.

(Testimony of Thomas Francis Nolan.)

Q. The porter was in the car at that time?

A. Yes, sir.

Q. What did you yourself do? [175]

A. I then went and summoned the train conductor.

Q. Do you recall where you may have found him?

A. He was forward in the train. I can't tell you exactly what spot, but it was forwarded in the train.

Q. What did you do then?

A. We asked—I asked Mrs. Harrington if she desired a doctor.

Q. Did you return to Mrs. Harrington?

A. Yes. I should say I came back with the train conductor and I inquired as to whether a doctor was desired and was told that that wouldn't, that it wasn't necessary, it was thought to be unnecessary.

Q. Was the daughter there at the time you returned?

A. Yes, sir.

Q. Was the porter in the car when you returned?

A. Yes, sir.

Q. Did you make any offer of assistance of any kind?

A. Yes, sir. The very fact that I offered to wire for a doctor, that in itself, and I did eventually ask if the berth wanted to be made up.

Q. Was that at the suggestion of either Mrs. Harrington or her daughter?

A. No, I wouldn't say it was. I am inclined to

(Testimony of Thomas Francis Nolan.)

believe that I asked if they wanted it made down for her comfort.

Q. Did you wire for a doctor immediately?

A. No, sir. [176]

Q. Did you immediately order the berth made down? A. No, sir.

Q. Did you inquire of Mrs. Harrington or her daughter, either one, whether they wanted you to take such action?

A. I believe it was Miss Harrington I talked with for the most part. I inquired of her, as I recall.

Q. What did she say?

A. She said, as I recall, no not at that time, she didn't think so.

Q. Did Mrs. Harrington make any explanation of how or why she had fallen?

A. No, sir, not to me she didn't.

Q. Did you, at any time, make any inquiry to determine whether anyone else in the car may have known how or why Mrs. Harrington may have fallen?

A. Immediately I did not, but I did later. Immediately I didn't, I was concerned with other things.

Q. When was it you inquired of the other witnesses?

A. I would roughly judge, perhaps, after I satisfied myself that they didn't want a doctor and didn't want the berth made down, and I am inclined to

(Testimony of Thomas Francis Nolan.)

believe I completed picking up my tickets and it was after that some time that I inquired about witnesses.

Q. What did you learn with respect to whether or not there were any other witnesses? [177]

A. I received the names of several witnesses.

Q. Do you recall them now?

A. Yes, sir, I can recall their names, I believe I can.

Q. What are they?

A. There was a Mr. and Mrs. Stratton. There was a lady with two children—that name slipped me for the moment.

Q. Can you tell us how many people there were?

A. Yes. I took down the names of five people. That is not counting the names of those two children, however. Mr. and Mrs. Stratton, Mr. and Mrs. Abney—I think the name is Abney.

Q. From Alabama?

A. From some place down South.

Q. Do you know the name of the fifth person?

A. It was this mother of the two children. Sorry, I can't recall it right now.

Q. But, according to your recollection, there were five adults? A. Yes, sir.

Q. And two children?

A. Two children, but I didn't take the names of the children.

Q. Two children with one of the ladies?

A. Yes, sir.

Q. You took the names of the witnesses and their addresses? A. Yes, sir.

(Testimony of Thomas Francis Nolan.)

Q. That is all the witnesses you were able to identify? [178]

A. That is all I was able to secure.

Q. Mr. Nolan, would you be able to give us any idea how long it was from the time you left Seattle until you reached Section 12, Car A and first learned of Mrs. Harrington's accident?

A. I would say approximately, I would say from half an hour to 45 minutes.

Q. Do you know where you were on the railroad? That is, would you be able to identify any station on the railroad where you were at the time you arrived at Section 12 and learned of the accident?

A. No, sir, I would not. I don't recall any specific location.

Q. Was Mrs. Harrington in Section 12 when you first saw her?

A. Yes, sir.

Q. Did she hold a ticket for that space?

Mr. McCaffery, Jr.: Object to this question. It has been admitted in the answer.

Court: Go ahead, answer the question. Overruled.

A. You mean did she hold a ticket personally herself?

Q. Yes.

A. I believe her daughter held the tickets.

Q. She and her daughter did hold tickets for Section 12?

A. Yes.

Q. Did anyone else on that train hold tickets calling for Section 12?

A. No, sir. [179]

(Testimony of Thomas Francis Nolan.)

Q. So far as you know, was there any duplication or mixup in the occupancy or sale of tickets for Section 12? A. No, sir.

Q. Do you have any recollection, Mr. Nolan, as to whether or not the train had made any stops between Seattle and the time when you reached Section 12 and first learned of Mrs. Harrington's accident?

Mr. McCaffery, Jr.: Just a minute. To which we will object on the grounds and for the reason it isn't the best evidence. That the trains are equipped with a ticker and that would definitely show whether any stops had or had not been made. That is the size of it.

Court: Overruled.

A. There was one stop made.

Q. What? A. There was one stop made.

Q. Where was that? A. Renton.

Q. Is that a scheduled stop? A. Yes, sir.

Q. Approximately how far out of Seattle is it?

A. Approximately 12 miles. I am more or less guessing at that, sir.

Q. Well, we will have more definite information on it. Is that a stop at which the train has an assigned period of time [180] to wait there or not?

A. No, sir.

Q. Did you get off the train at Renton?

A. No, sir, I did not.

Q. Was the entire time between the time the

(Testimony of Thomas Francis Nolan.)

train left Seattle and the time you reached Section 12 taken up by you collecting tickets?

A. Yes, sir.

Q. In the process of collecting those tickets, were you then on your feet during all that time?

A. At all times, sir.

Q. Will you tell us, if you can, whether or not there were any lurches or jerks in the movement of that train between the time it left Seattle and the time you got up to Section 12?

A. I have no recollection, sir, of any unusual movement of the car.

Q. You testified you were on your feet during the whole of that time?

A. Necessarily so, picking up tickets.

Q. Do you recall whether or not there was any jerk in the movement of that train as it started up from the stop at Renton?

A. No, sir.

Q. You were on your feet at that time?

A. Yes, sir.

Q. About how long after you first learned of Mrs. Harrington's [181] accident did you order the berth made up?

A. I am not so sure I could say, sir. Roughly speaking, I estimate it might have been within the following couple hours. That is, it was within the following couple of hours, I believe, but I can't be too specific about that.

Q. Was that on your own initiative or at the request of either Miss or Mrs. Harrington?

(Testimony of Thomas Francis Nolan.)

A. As I recall, Miss Harrington, at a later time, asked me to have the berth made up.

Q. How did you arrange to have that done?

A. I notified the porter and he did so.

Q. You stated you later arranged to have a wire sent for a doctor? A. That's right, sir.

Q. Approximately how long was that after you first learned of the accident?

A. I am inclined to believe it was about the same time we had the berth made up.

Q. Was that on your own initiative or the request of Miss Harrington?

A. At the request of Miss Harrington.

Q. What arrangements did you make for a doctor?

A. I notified the train conductor. As is the usual procedure, I made out the wire and gave it to him and he dropped it off.

Q. Where was the wire addressed? [182]

A. To Spokane.

Q. To arrange for a doctor to meet the train at Spokane? A. That's right, sir.

Q. Did you, at any time after this, inquire of either Mrs. Harrington or Miss Harrington whether there was anything more you could do to assist either of them?

A. I don't know whether it was due to my inquiry or whether Miss Harrington came up to me about having changed her mind about wanting a doctor and wanting the berth laid down.

(Testimony of Thomas Francis Nolan.)

Q. Did you at any time offer to assist them in any way?

A. I hope it was understood that we would be at their assistance at any time. That is the general belief I would like to give at a time like that.

Q. Insofar as any request may have been made of you by either Mrs. Harrington or Miss Harrington, did you attempt to comply with it?

A. Yes, sir.

Mr. Pauly: That is all.

Cross-Examination

By Mr. McCaffery, Jr.:

Q. I think it is Thomas Patrick Nolan?

A. No, sir.

Q. Thomas Francis? A. That's right.

Q. Mr. Nolan, isn't it a fact that it is the custom of the conductors, the sleeping car conductor in the Touralux and the conductor in the Pullman cars to start in at the observation car and pick up tickets together and then meet the train conductor in the Touralux cars?

A. Are you assuming I picked up Pullman tickets?

Q. Yes.

A. No, sir, I have no chores in those Pullmans.

Q. I am not asking what chores you have. We have had evidence from you as to what the custom of the railroad has been. I am just asking you a very simple question as to what the custom is between you and the Pullman conductor in picking up

(Testimony of Thomas Francis Nolan.)

tickets. Is it not the custom, Mr. Nolan, for you and the Pullman conductor to start from the observation car and work forward?

A. It isn't the custom.

Q. Do you do it? A. No, sir.

Q. Never do it? A. We never have.

Q. The Pullman conductor wasn't with you at the time you came to Mrs. Harrington?

A. No, sir.

Q. And you asked about her ticket?

A. Yes, sir. [184]

Q. You were absolutely alone?

A. Yes, sir.

Q. You were? You had started in Car B?

A. That's right.

Q. Another thing, Mr. Nolan, if you know: Do the porters leave for lunch immediately after the train leaves Seattle? A. No, sir.

Q. When do they have their lunch?

A. They have it sometime later, considerably later.

Q. How much later?

A. Well, it would generally be after 3:30.

Q. After 3:30? A. Yes, sir.

Q. That would be a period of 45 minutes out of Seattle?

A. Probably longer than 45 minutes.

Q. You said 3:30. A. I said after 3:30.

Q. You left at 2:45? A. That's right.

Q. You remember that distinctly?

(Testimony of Thomas Francis Nolan.)

A. I won't say that, that is, distinctly, but that is the time we generally leave.

Q. That is the time you are scheduled to leave?

A. That's right, sir.

Q. On your train schedule out of Seattle, you have listed [185] Black River and Renton in the same type. Is Black River a scheduled stop or not?

A. Before answering that, sir, may I say my work does not concern having one of those schedules that give all those stops. I can answer the question if you care to have me do so. Black River is not a stop.

Q. Renton is a scheduled stop?

A. Yes, sir.

Q. I think you stated you got the names of five people as witnesses in the car?

A. That's right, sir.

Q. You picked up their tickets?

A. Of the witnesses, sir.

Q. Of those same witnesses? A. Yes, sir.

Q. How many were travelling on passes?

A. None.

Q. Not a one? A. No, sir.

Q. How many passes did you have on car 12 that day? A. On which car, sir?

Q. Car 16?

A. I don't think I had any passes; in fact, I know I didn't.

Q. You know you didn't. Did the Pullman conductor ever come to the place where Mrs. Harrington was seated in Section 12 of [186] Car A?

(Testimony of Thomas Francis Nolan.)

A. To my knowledge, he didn't.

Q. He didn't. Then it was the train conductor who you brought back with you to the car?

A. Yes, sir.

Q. Was the Passenger Agent brought also; was he on the train?

A. Just what do you mean by Passenger Agent?

Q. I don't know that is the term used on the railroad, you got me.

A. I will answer no.

Q. Was any other person who had any official capacity with the railroad brought back? Did you bring anybody else?

A. I did not.

Q. Did any official of the railroad company other than the train conductor and yourself come back?

A. It is quite likely.

Q. And it being quite likely, Mr. Nolan, who would it be?

A. I think perhaps you are referring to what we call the Passenger Representative.

Q. Do you know the name of the Passenger Representative, Mr. Nolan?

A. I have a recollection his name was Mr. Weltenback, it is a name similar to that.

Q. Have you seen him present in the court room?

A. No, sir. [187]

Q. You haven't seen him here?

A. No, sir.

Q. I don't suppose, Mr. Nolan, you want this jury to understand by your answer that there was

(Testimony of Thomas Francis Nolan.)

no mix-up in the section that Mrs. Harrington occupied that so far as you know, you don't know there was any mix-up before you talked to Mrs. Harrington?

A. A mix-up of what sort, sir?

Q. In her occupancy of Section 12.

A. No, I don't know there was.

Q. You don't know. In other words, at the time you picked up her tickets, she was seated in her proper section?

A. That's right, sir.

Q. But you are not willing to testify as to anything that occurred before that time, are you, Mr. Nolan?

A. No, because I wasn't in the car.

Q. You didn't know. Isn't it a fact, Mr. Nolan, that as you progressed through your car, you are very careful to travel the rugged portion of the aisle and stand on the rugs picking up tickets?

A. I am travelling on the aisle.

Q. You are travelling on the aisle?

A. That's right.

Q. And that is covered with rug, is it not, Mr. Nolan?

A. That's right, sir. [188]

Q. Had you or had you not, Mr. Nolan, reached the town of Ellensburg at the time you wired for a doctor, or had you passed it, if you can recall?

A. I can't recall, sir.

Q. Do you make a scheduled stop at Ellensburg, or do you not?

A. Do we, or did we?

Q. All right, did you?

A. We do.

(Testimony of Thomas Francis Nolan.)

Q. Did you then?

A. We do now, but we didn't then. We didn't do it at that time.

Q. Ellensburg is quite a large town, isn't it?

A. I don't know. I have never been in town, just gone through.

Q. You have a considerable stop, Mr. Nolan, at Othello? A. Yes, sir.

Q. Would you be able to state whether or not you had wired ahead to Spokane before you had arrived at Othello?

A. I am not able to say, sir.

Q. Can you tell me in which manner the wire was dispatched?

A. Yes, I made out the, I wrote out the message and gave it to the train conductor, and he in turn dropped it off, as we say, or handed it in.

Q. That doesn't require a physical stop of the train to send a wire then?

A. I am afraid I can't answer that because I am not too well [189] acquainted with the different methods there are of passing off and handing off telegrams.

Q. I believe that the schedule would bring the train upon which you were travelling into Othello at 7:20 in the evening? A. That's right, sir.

Q. There is a 15 minute scheduled stop at Othello? A. That is correct.

Q. That is about two hours and 40 minutes out of Spokane? There is a scheduled stop at Spokane at 9:55? A. Yes, sir.

(Testimony of Thomas Francis Nolan.)

Q. You have no independent recollection at this time, Mr. Nolan, as to whether that wire had been dispatched before you left Othello or not?

A. No, sir, I do not.

Q. You said, I believe, you prepared the wire?

A. Yes, sir.

Q. You wired for the doctor at Spokane?

A. I wired to Spokane for a doctor.

Q. You wired to Spokane for a doctor?

A. Yes, sir.

Q. Was there any reason that you can ascribe at this time, Mr. Nolan, why the wire was not directed to Othello?

A. I don't know. I am not so sure whether there was a doctor at Othello. That might have had some bearing on it, but I am not sure. [190]

Q. Did you get a railroad ticket from Mrs. Harrington?

A. Personally from her, do you mean?

Q. Yes. A. No, sir.

Q. What did she tell you?

A. I am not so sure. I am inclined to believe I heard some place, from her or from another source, that the tickets were in the daughter's possession, but I won't say Mrs. Harrington told me that. That was the impression I received some place.

Q. Who turned over the ticket for Mrs. Harrington's transportation to you?

A. That I don't recall.

(Testimony of Thomas Francis Nolan.)

Q. When did you pick up your sleeping car accommodations for Section 12 and from whom?

A. I don't know. I either got them directly from Miss Harrington, or perhaps, they might have been given to me by the train conductor. Sometimes that is done; or by some other party on the train.

Q. Mr. Nolan, do you have any idea how you remembered the sequence of those cars as B, A, F, on that night? A. On that night?

Q. On that train?

A. That day? That is the way they had been on every train I had worked up to that time.

Q. That is the custom, then, B, A, F? [191]

A. That is from the rear.

Q. I understand. A. It is just B, A, F.

Q. B, A, F, it is always B, A, F?

A. Yes, on the Touralux.

Q. Then, behind that train on that particular day, how many Pullman sections did you have?

A. By "behind the train," you mean on the train?

Q. Including the club car. I think the club car is usually situated behind B on the train?

A. No, sir.

Q. Would it be ahead of F? A. Yes, sir.

Q. Then behind B did you have your diner?

A. Yes, sir.

Q. Then behind the diner, you would have a Pullman and an observation?

(Testimony of Thomas Francis Nolan.)

A. That's right, sir.

Q. On that day, were you pulling the new type equipment or old type on the pullman sections, do you remember?

A. We were pulling old type as far as Pullman sections were concerned, sir.

Q. Did you state on direct examination, Mr. Nolan that you called the porter to make up the birth?

A. I said I notified the porter. To the best of my recollection [192] I did.

Q. But somebody else might have?

A. That is entirely possible.

Mr. McCaffery, Jr.: That is all, Mr. Nolan.

Redirect Examination

By Mr. Pauly:

Q. Let me ask you: Did anyone, previous to the time when you arrived at Section 12, approach you regarding any sort of mix-up or duplication of space in Section 12 in Car A?

A. To my knowledge, no one did.

Q. In answering that question, do you intend to refer both to the time you were at Seattle and after you left Seattle?

A. That's right, sir.

Q. Did the porter, at any time, either before leaving Seattle or afterward, ever come to you regarding a mix-up or duplication in the occupancy of Section 12, Car A?

A. No, sir.

Q. You were asked whether the Pullman conductor came up to Section 12 in Car A. Does the

(Testimony of Thomas Francis Nolan.)

Pullman conductor have anything to do with that part of the train?

A. No, sir, nothing whatever.

Q. You have nothing yourself to do with the Pullman section? A. Absolutely not.

Q. He has nothing to do with the Touralux section? [193] A. That's right.

Q. Who is this other train official you referred to?

A. He is what we call a Passenger Representative.

Q. Is he a part of the train crew?

A. At that time he wasn't what you would call a regular train employee in the true sense of the word. He was riding on the train. He was rather what you would call a company employee riding on the train.

Q. There may have been other company employees?

A. Yes, there could have been others, but this man we knew was there.

Q. You were asked whether you walked on carpets all the time. I will ask you, Mr. Nolan, if there are any carpets on the part of the Touralux cars that go past the rest rooms at either end of the car?

A. I understood the question to be did I walk on carpets while I picked up tickets, and I answered yes. That is true while I am actually picking up tickets.

(Testimony of Thomas Francis Nolan.)

Q. While you are in the ends of the cars along side of the rest rooms, there is no carpeting there?

A. There is no carpeting there and I pick up no tickets.

Q. The floor there is the same as between the seats on either side of the aisle? A. Yes, sir.

Q. In the men's room there is no carpeting in part of that? [194]

A. On part of that there is no carpeting.

Q. Do you know whether or not you might have been in there picking up tickets any time?

A. I do occasionally. If there is passengers sitting in there, I will go in and pick up tickets.

Q. Going from one end of a car to the next car, there is no carpets in there, of course?

A. No.

Recross-Examination

By Mr. McCaffery, Jr.:

Q. Mr. Nolan, for the benefit of the jury, would you describe the vestibule in the front end of the car and the vestibule in the rear end of Car A with reference to the corridor through which you pass once you leave the rugged surface passing from the aisle of the car? A. Would I describe it?

Q. Yes.

A. It is about, roughly speaking—here again I am approximating this measurement—I would say about two and a half feet wide. It runs along the windows, the windows are one side, that is the side you are on, and the side of the ladies' lounge or

(Testimony of Thomas Francis Nolan.)

men's lounge, as the case may be, is on the other side, and the floor has this composition we spoke of, no carpeting, and there is a rail along there, a safety rail. [195]

Q. There is a rail along the window side, is there not, Mr. Nolan? A. Yes, sir.

Q. Along the left side there is a complete wall?

A. These aisles we refer to are on opposite sides of the car.

Q. I see what you mean.

A. On the men's end, of course the Aisle would be on the left hand side of the men's lounge, and, of course, in the other end, it would be to the right of the ladies' lounge.

Q. Would I be incorrect in stating, Mr. Nolan, that there is complete protection to anybody traversing that area from a full wall on one side and a hand rail on the other?

A. I would say it is protection, yes, sir.

Mr. McCaffery, Jr.: That is all.

Court: Mr. Nolan, this Passenger Representative?

A. Yes.

Court: He was on the train. Was he working on the train?

A. In a sense he was working. He was accompanying us at that time, the train being new, and I believe they were. They probably had a multitude of duties.

Court: But the Train Representative actually was engaged in his business on that train?

(Testimony of Thomas Francis Nolan.)

A. What I want to make clear was: we don't have them all the time. We don't have them at this time, for instance. It was a temporary measure.

Court: There is one other question I want to ask you, Mr. Nolan. Do you recall the train stopping at Renton?

A. I don't recall definitely it stopped there. There is a scheduled stop there.

Court: But you don't recall it?

A. Not in particular. I know there is a stop there.

Court: Very well, that is all. I think we will take a short recess, Mr. Pauly, at this time.

(Witness excused).

(Ten-minute recess.)

JESSE LOVE

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pauly:

Q. What is your name?

A. Jesse Love.

Q. Where do you live? A. Chicago.

Q. Are you employed by the Milwaukee Railroad?
A. Yes, sir.

Q. In what capacity?

A. Sleeping Car Department.

Q. What specifically is your job? [197]

(Testimony of Jesse Love.)

A. Sleeping car porter.

Q. How long have you been employed by the Milwaukee Railroad as a sleeping car porter?

A. 27 years.

Q. Were you so employed in August, 1947?

A. Yes, sir.

Q. Were you so employed on train No. 16 leaving Seattle on August 26, 1947?

A. Yes, sir.

Q. What car were you assigned to?

A. Car A-16.

Q. What in general is that referred to as, what kind of a car is that?

A. Touralux car.

Q. Is that a sleeping car?

A. Yes, sir.

Q. How long had you been on that assignment before August 26th, on that particular train, 1947?

A. That train was put on, I think, June 29th, and I was on since the new train had been put on.

Q. You went on that train as sleeping car porter when that train started, is that right?

A. Yes, sir.

Q. Do you recall that as being the train trip on which Mrs. Harrington claims to have suffered an accident? [198]

A. Yes, sir.

Q. Do you recall you assisted Mrs. Harrington and her daughter to board the train at Seattle?

A. I don't remember.

Q. Do you remember whether or not you carried any luggage for them on to the train?

A. I don't remember that.

Q. On the train do you know whether or not you assisted them in occupying Section 12?

(Testimony of Jesse Love.)

A. Yes, sir.

Q. Was that when they first boarded the train or not?

A. When they first boarded the train.

Q. You showed them to their section?

A. Yes, sir.

Q. Did you inquire of them what section they occupied? A. Yes, sir.

Q. What did they tell you they occupied?

A. Section 12.

Q. Is that the section to which you took them?

A. Yes, sir.

Q. Was there anybody in that section at that time? A. No, sir.

Q. Do you recall whether you put any luggage belonging to Mrs. Harrington or Miss Harrington into Section 12 at that time?

A. Yes, sir. [199]

Q. What luggage did you put in the Section?

A. I didn't understand you.

Q. What luggage did you put in the section?

A. Some bags.

Q. Where? A. Section 12.

Q. What part of Section 12?

A. I put them in the seat, front seat, underneath the seat.

Q. How many pieces were there, if you know?

A. I think there was about three pieces, two or three pieces.

Q. Some you put on the seat, some under the seat, is that right? A. That's right.

(Testimony of Jesse Love.)

Q. As far as you know, Mr. Love, did anyone else on that train hold any ticket for Section 12 leaving Seattle that day, other than Mrs. Harrington and her daughter? A. No, sir.

Q. Did you, before the train left Seattle, go make any inquiry of the sleeping car conductor regarding who was entitled to occupy Section 12 in Car A-16?

A. No, sir.

Q. Did you make any such inquiry of any other person? A. No, sir.

Q. Did you make any such inquiry of any person after leaving Seattle? [200] A. No, sir.

Q. How did you first learn, Mr. Love, that Mrs. Harrington had been in an accident?

A. A passenger told me. I was in the rear of the car and a passenger told me there was a lady fell out of the seat.

Q. Do you know who the passenger was?

A. No.

Q. A man or lady? A. A man.

Q. Where were you at that time?

A. In the rear of the car.

Q. What, if anything, were you doing?

A. Straightening out some linen in the locker.

Q. In what locker?

A. In the locker, my linen locker.

Q. In what part of the car is the locker located?

A. In the rear end of it around Section 1 and 2. That is the car's rear end.

(Testimony of Jesse Love.)

Q. The low numbered sections are located to the rear of the car? A. Yes, sir.

Q. Where is the ladies' rest room located?

A. In the front end of the car.

Q. And the high numbers are located to the front end? A. Yes, sir. [201]

Q. The men's room, then, is located to the rear end? A. That's right.

Q. Where is your locker with respect to the men's room?

A. Next to the men's room; around close to the men's room in the rear end.

Q. Are the Touralux cars always transported in that position with the high numbers forward and the low numbers to the rear? A. Yes, sir.

Q. Is there any particular reason, Mr. Love, why that is so?

A. That is the way it is made, the way the berths got to be laid down.

Q. Will you explain that a little further to us?

A. It is the way it is made. The berth opens up from the front. Otherwise, the passenger would be riding backwards.

Q. When a berth is made up, the person lying in the berth should have their head to the front end of the train, is that right? A. Yes, sir.

Q. I take it from what you say these Touralux berths are so designed that the head end of the berth must always point toward the end of the car which has the high numbers? A. That's right.

(Testimony of Jesse Love.)

Q. If it were otherwise, the passengers would be sleeping backwards with their heads pointing toward the rear of the train? [202]

A. Yes, sir.

Q. What is there about the berth that results in that? What is there about it that makes it necessary for the head to point in that particular direction?

A. That is the regular way of riding. Those particular cars are made one way, that is from the head one way. Those Touralux cars are made that way, so it couldn't be used otherwise. If you did, it would be going backwards.

Q. Couldn't you reverse the passenger by simply switching the pillow? A. It isn't handy.

Q. Are there any shelves involved in making up a berth in a Touralux car?

A. At the foot of the bed there is a little shelf. You raise the back up and there is a little shelf.

Q. Is there any such shelf at the head?

A. No.

Q. So, if the car wasn't in that position, the shelf would be at the head? A. That's right.

Q. Is the mattress designed so as to require the bed to be made up in that position?

A. Yes, it is. In a way of speaking, it is slit half in two. It is split half open. There is a separation in there.

Q. Is the separation in the middle? [203]

A. More at one end than directly in the middle.

(Testimony of Jesse Love.)

Q. At the time that you first learned of Mrs. Harrington's accident you were standing near your locker in the rear end of the car. What did you do then? A. I went to see what could be done.

Q. Who, if anyone, was there when you got there?

A. The conductor was there when I got there.

Q. What conductor are you referring to?

A. The sleeping car conductor.

Q. Mr. Nolan? A. Yes, sir.

Q. Where was Mrs. Harrington?

A. She was in her seat.

Q. In what section? A. 12.

Q. As far as you know, did she at any time occupy any other seat in the train except in Section 12? A. No, sir.

Q. On arrival there at Section 12 when Mr. Nolan was there, did he instruct you to do anything?

A. Yes, sir.

Q. What did he instruct you to do?

A. Go and get her daughter, the lady's daughter.

Q. Did you yourself know where the daughter was?

A. I didn't know. I heard someone say where she was. [204]

Q. Where did you go looking for her?

A. In the club car.

Q. You had been given reason to think she was there? A. That is what they told me.

Q. Who told you?

(Testimony of Jesse Love.)

A. The passengers standing around there. They told me she was in the club car.

Q. By the club car—where is the club car located in that train, if you know, with reference to car A?

A. The club car is located the second car. The next car is car F and the next car is the club car. There is car F and the club car.

Q. Going forward in the train?

A. Yes, sir, going forward.

Q. The club car is different than the observation car?

A. Yes, sure.

Q. Did you find Miss Harrington in the club car?

A. Yes, sir.

Q. Did you tell her?

A. Yes, sir.

Q. What did you tell her?

A. I told her her mother had an accident, fell out of the seat.

Q. Did she return to car A?

A. Come right back, yes, sir. [205]

Q. What did you do?

A. I come back with her.

Q. When you got back there, was Mr. Nolan at Section 12?

A. Yes, they were all there, quite a few of them standing there.

Q. Who else was there?

A. Some of the passengers and Mr. Nolan.

Q. And Mr. Nolan?

A. And Mr. Nolan

Q. Do you know if the train conductor was there or not?

(Testimony of Jesse Love.)

A. Was the train conductor there?

Q. Yes. A. Not at that particular time.

Q. Did the train conductor later arrive?

A. Yes, sir.

Q. There were other people there present too?

A. Yes, sir.

Q. What did you do then?

A. There was nothing for me to do then. I couldn't do anything at the present time.

Q. Were there other people between you and the section in the aisle? A. Yes, sir.

Q. Did you go through those people to the Section? A. I did. [206]

Q. Did you pass through those people standing in the aisle to go to the section?

A. Yes, sir, I got through them.

Q. Did you take part in any conversation there?

A. Not then, just merely standing there and listening.

Q. The train conductor and Mr. Nolan were there while you were there?

A. The train conductor came there shortly after.

Q. Were they in conversation with Miss Harrington and Mrs. Harrington? A. Yes, sir.

Q. You yourself took no part in it?

A. Yes, sir.

Q. Did Mrs. Harrington make any statement as to what happened?

A. No, not at that particular time.

Q. Did you hear any statement from anyone

(Testimony of Jesse Love.)

else—withdraw that question. Do you know, Mr. Love, approximately how long it may have been after leaving Seattle when you first learned of Mrs. Harrington's accident?

A. Well, I don't believe I could exactly say. It must have been about 35 or 40 minutes, maybe a little longer than that. It was after we left Renton.

Q. It was after you left Renton?

A. After we left Renton.

Q. How far from Renton, or do you know? [207]

A. I couldn't say.

Q. You, of course, didn't see Mrs. Harrington?

A. How is that?

Q. You did not see Mrs. Harrington's accident? You yourself didn't see the accident?

A. No, sir.

Q. Could you have seen it from where you stood by your locker?

A. No, I couldn't have seen it.

Q. Let me ask you if during any part of the time after the train left Seattle and the time you heard of this accident you left car A?

A. No, sir.

Q. Did you get off the train at Renton, do you know? A. Yes, sir, I got off there.

Q. Did you leave the car at Renton?

A. I was standing right by. You have to get off there for a second or two, just make a little stop.

Q. Except for that instance, did you leave Car A at any other time? A. No, sir.

(Testimony of Jesse Love.)

Q. Between Seattle and the time you learned of Mrs. Harrington's accident? A. No, sir.

Q. Do you recall whether or not you made up Section 12 so that Mrs. Harrington could lie down?

A. Yes, sir.

Q. Do you know how long that was after you first learned of the accident, approximately?

A. About an hour or an hour and a half, something like that.

Q. Who asked you to do that, Mr. Love?

A. Mr. Nolan, the sleeping car conductor.

Q. The sleeping car conductor, Mr. Nolan?

A. Yes.

Q. Did Miss Harrington ask you to do so?

A. No, she didn't ask.

Q. Mr. Love, I ask you whether or not the sections in Touralux cars are equipped with a bell used for the purpose of summoning the porter?

Mr. McCaffery, Jr.: Just a minute, to which we object on the grounds and for the reason that the affirmative defense as asserted by the defendant in its pleading does not state facts sufficient to constitute a defense to this action on the following grounds and for the following reasons: that the defense sought to be asserted would only constitute some negligence on the part of the plaintiff, if proven, and such negligence would be remote and would not in any way contribute to her injuries; second, that the defense, if asserted, would not tend to show negligence of a passenger who attempted

(Testimony of Jesse Love.)

or stood up while the train was stopped in an attempt to hang up her hat; that there is no requirement that a person ring for the porter, and even though the testimony were to show that the car was so equipped, the asserted defense would fail because such negligence, if any, would not be a contributing, concurring, or proximate cause of the plaintiff's injuries.

Court: Did you cite authority on that in your trial memorandum, Mr. McCaffery?

Mr. McCaffery, Jr.: I did not, your Honor.

Court: Do you have any?

Mr. McCaffery, Jr.: I don't have any at this time.

Court: Do you want the Court to consider the problem further before ruling on it?

Mr. McCaffery, Jr.: May I have a few minutes to consult with co-counsel in this connection?

Court: I think before you go further that the Court is going to take some time and consider the matter.

Mr. McCaffery, Jr.: I want to add another grounds to our motion, if the Court please. On the further grounds and for the further reason that the evidence at this point discloses that the porter had been in assistance upon the defendant and had previously failed in his duties to the plaintiff in assisting her by hanging up her hat or otherwise rendering such assistance as porters are customarily required to render. Further, that the affirmative

(Testimony of Jesse Love.)

defense fails to assert that it was her negligence which proximately caused her injuries and merely asserts she was negligent and careless in failing to wait [210] for the services of the porter.

Court: Ladies and gentlemen of the jury, you are admonished by the Court not to discuss with each other or anyone else, nor suffer yourselves to be addressed by anyone concerning the subject of this trial, nor are you to form or express any opinion thereon until the case is finally submitted to you. You will be excused until ten o'clock tomorrow morning. You may leave the stand, Mr. Love.

(Thereafter, in the absence of the jury, argument was had in the absence of the jury, after which an adjournment was taken until 10 o'clock a.m., the following morning, October 21, 1949, at which time the following proceedings were had, the jury and counsel for both parties being present:)

Court: Where is the witness? The witness Love, I believe was on the stand. The matter before the Court now is the objection of plaintiff to the introduction of evidence, is that right?

Mr. Garlington: I believe that is right, your Honor. Perhaps before you make a ruling on that objection you might pass upon our application to amend the affirmative defense in the answer. We ask leave to amend the affirmative defense in accordance with the written amendment heretofore

furnished to the Court and counsel by inserting the same at the beginning of paragraph 2 of the affirmative defense set up in the defendant's answer. The application to amend is made and based upon the change in the issues presented by the amendment to the plaintiff's complaint which was allowed yesterday.

Court: Any objection on the part of the plaintiff?

Mr. McCaffery, Jr.: The plaintiff objects to the amendment proposed to be filed on the grounds and for the reasons that the defenses therein set forth is not a defense of contributory negligence, but by its terms and language is a defense of assumption of risk; that the law is well settled that in the relationship of passenger and carrier, the law of assumption of risk does not apply, and that to permit its assertion at this time would only serve to encumber the record, it would be prejudicial error to the rights of the plaintiff; it does not have any consistency with the plea as already framed and made by the defendant in its plea of contributory negligence, and that if permitted, the defenses should be separated so that the defense of assumption of risk and that of contributory negligence could be separately attacked.

Court: Objection is overruled, and leave is granted to file the amended defense.

(The amendment permitted to be made to the answer is as follows:)

“That plaintiff saw and realized, or by the exercise of reasonable care should have seen and realized, that the floor surface between the seats in Section 12 was a bare composition floor instead of a carpeted floor. That if said floor rendered the footing insecure for the plaintiff while standing thereon [212] during travel, she knew and realized the same, or by the exercise of reasonable care should have done so, and should not have incurred the risk, if there was a risk, of standing and moving about on such floor without assistance.”

Court: Proceed.

(Witness Jesse Love resumes the stand for continued direct examination by Mr. Pauly:)

(Last question read back by reporter as follows: Mr. Love, I ask you whether or not the sections in Touralux cars are equipped with a bell used for the purpose of summoning the porter?)

Court: The objection is overruled. You may answer.

A. They are.

Q. Would you describe in general what that bell system consists of?

A. The bell system consists of the service of the porter.

Q. I am asking you to describe the attachments that make up and constitute the bell system or buzzer system, whatever it might be. Do you understand what I want?

A. No, I don't.

(Testimony of Jesse Love.)

Court: How does the system work?

A. The bell?

Court: Yes, how does the bell system work?

A. It is a bell you ring on the car. It consists—it has a regular box where it registers, and it is a service bell and to ring that bell, that signifies that the porter is wanted and [213] it registers at the far end of the car.

Q. (By Mr. Pauly): Does each section have a button? A. Each section has a button.

Q. Is that button part of the buzzer system or electric system? A. Yes, sir.

Q. Can you tell us where the button is located in the section with reference to any other objects located in the section?

A. Underneath the lights.

Q. I show you a photograph marked Defendant's Exhibit 1-A and ask you whether the button appears in that picture? A. It does.

Q. And where? A. Underneath each light.

Q. The photograph shows a light on the far wall both to the right and left of the window?

A. Yes, sir.

Q. And there is a black dot appearing in the photograph below each light. Are those the buttons you refer to?

A. That is the buttons I am referring to.

Q. Does the same appear in Defendant's Exhibit 1-D? A. It does.

Q. Is the system an electric system?

(Testimony of Jesse Love.)

A. How is that?

Q. Is the buzzer system an electric system? [214]

A. Yes, sir.

Q. And if the button is pressed, you say it registers in a box?

Mr. McCaffery, Jr.: Just a minute, we will object to the question as assuming a fact not in evidence, leading and suggestive.

Court: Sustained.

Q. If a button located in such section is pressed, what, if any, effect does that cause in the register to which you refer?

Mr. McCaffery, Jr.: To which we object on the grounds and for the reasons it is calling for a conclusion of the witness, no proper foundation has been laid by this witness which would qualify him to describe or detail what the effect of an impulse of the electric current to a box would be.

Court: Overruled. Answer the question.

Q. Do you understand the question?

A. I didn't get the question.

(Question read back by reporter.)

A. It registers 12, any particular section in the car, when the button is pressed.

Q. Any button located in any berth will always register 12?

A. Any button located in any section of the car, it registers from the section you press the button from.

(Testimony of Jesse Love.)

Q. If a button located in Section 1 is pressed, what number appears in the register? [215]

A. It registers 1.

Q. And if the button in Section 12 is pressed, what number appears in the register?

Mr. McCaffery, Jr.: Just a minute, to which we object on the ground and for the reason it is calling for a conclusion of the witness. This witness isn't qualified to draw any conclusion that a particular button will raise a particular section number, and it assumes that the system is in working order and that there is no possibility of connecting wires being mixed.

Court: Overruled.

(Question read back by reporter.)

A. 12.

Q. Does any sort of sound result from the pressing of a button in any section?

A. Any sort of sound?

Q. Yes.

A. Sure, it is something like a ring, only it is a charm.

Q. A chime? A. A chime.

Q. Or gong. A. A gong like.

Q. Would you say that it is a loud gong or soft, can you describe it?

A. It is loud enough to be heard all over the car.

Q. Is there any difference in the gong sound depending on whether the button in 1 is pressed or in 12? A. No, there is no difference.

(Testimony of Jesse Love.)

Q. The gong is always the same?

A. Yes, sir.

Q. But a different number appears in the register?
A. Yes.

Q. Does the number in the register remain, or does it disappear after the button has been released?

A. It remains until I press a button to push it down.

Q. Where do you press that button?

A. Underneath the register, the box, the indicator.

Q. Where is the register box located?

A. It is located on the rear of the car near the gents' smoking room in the hall.

Q. Referring specifically to Car A-16 as carried as part of Train 16, leaving Seattle August 26, 1947, was that car equipped with such a gong system as you have described?
A. Yes, sir.

Q. Was Section 12 in that car equipped with such buttons as you have described?

A. Yes, sir.

Q. And with such a register; that is, was the car equipped with such a register as you have described?
A. Yes, sir. [217]

Q. Was that system in working order, do you know, on August 26, 1947?
A. Yes, sir.

Q. Would you tell us what is the purpose of that buzzer system?

Mr. McCaffery, Jr.: Just a minute. We will object to this on the ground and for the reason it is

(Testimony of Jesse Love.)

calling for a conclusion of the witness; that it is irrelevant and immaterial; that it is an attempt on the part of the defendant at this time by an indefinite question to lay prejudicial matter before the jury that we have not had a chance to object to.

Court: Read the question.

(Question read back by the reporter.)

Court: Sustained.

Q. Mr. Love, what would you do if a buzzer in any section were—if a buzzer in any section were pressed and a gong resulted, or if you observed as a result of that button being pressed a number exposed in the register?

Mr. McCaffery, Jr.: Just a minute, we will object to this as a compound question; secondly, we will further object on the ground and for the reason we are not interested in what Mr. Love does as a matter of custom or customarily, or under any hypothetical statement of facts; we are solely interested in what Mr. Love did on the 26th day of August, 1947, in answering any button pushed from Section 12, or the absence of [218] any button pushed, and no other set of circumstances, and for such reason any such answer would be irrelevant and immaterial and not within the issues of this case.

Court: Sustained.

Q. Mr. Love, on August 26, 1947, on Train 16, and in Car A-16, leaving Seattle, let me ask you

(Testimony of Jesse Love.)

whether or not any buzzers were pressed by any passenger in that car, do you know?

A. No, I don't remember.

Q. If a button in Section 12 had been pressed, and assuming, of course, that the buzzer system is in good working order and you were present, what would you have done?

Mr. McCaffery, Jr.: We will object to this on the same grounds as the objections previously made, on the grounds and for the reasons that what he would customarily do, or what the rules and regulations of the railroad company would indicate he should do under those circumstances is not a part of what he did at the time in question, or whether there was any occasion for him to do anything in answer to a buzzer, and that it is a question calling for solely negative testimony; it has no relation at all to any of the affirmative issues in this case.

Mr. Pauly: May it please the Court, I think counsel takes an unqualifiedly restricted view of the issues of the case and the purpose of the testimony. The question is asked for the purpose of showing what facilities were available and what [219] service would have been rendered if use had been made of the facilities available.

Court: That is speculative, isn't it, as to what service would have been rendered? I don't see; you first say, "Did the bell ring"? You say, "No." You say, "If the bell did ring, what would have been

(Testimony of Jesse Love.)

done''? It is purely speculative. I don't see it is of any assistance to the Court or jury here.

Mr. Pauly: It certainly—the buzzer system is there for a purpose. It is our purpose to show here what that purpose is. It concerns this particular person and what he would have done as part of his ordinary functions if use had been made of that system. It seems to me that that is strictly pertinent and material under the defense of contributory negligence. At that time, plaintiff here had at her disposal a bell system which would have summoned the porter and which she herself did not use, and which we, in our answer, allege constitutes contributory negligence on her part. We do not contend, of course, that she actually did use it. That is the entire point, the fact that she did not use it.

Court: You can show what his duties are with reference to the service he renders on the car, but what he would have done if the bell had been rung, which wasn't rung, is not admissible.

Q. Mr. Love, as porter on that car, will you describe in general what your duties consisted of?

A. What my duties consist of?

Q. Yes.

A. My duties in general consist of receiving passengers, taking down beds, discharging them, keeping the car clean, giving them such service as putting away bags and luggage and other things that is within the bounds of reason. That is my duties.

(Testimony of Jesse Love.)

Q. Do your duties include any conduct or action with regard to the buzzer system that you have described?

A. Yes, to answer the buzzer and see what the passengers want. If they want anything in the line of service that I can render to them and give them service the best that can be had to give to them. That is my general duties, practically, on the car.

Q. If a button in Section 12 were pushed or pressed, would it be a part of your duty to inquire what the occupant of that section desired?

A. Yes.

Q. If the occupant of Section 12 summoned you by using that bell system and requested you to hang up a hat, would you consider it a part of your duties to comply with that request?

Mr. McCaffery, Jr.: To which we object on the grounds and for the reason that it is assuming a state of facts not in evidence; that it calls for conjecture of the witness; that the element of whether or not the porter were present in the car [221] to render the service is not laid before the witness in the question; that it calls for a recitation of what he would customarily do; that it is negative testimony and has no probative value so far as the issues of this case are concerned.

Mr. Pauly: I think counsel misunderstood the effect of the question. I have asked him if he would consider it a part of his duties to do so; I didn't ask him if he would do it?

(Testimony of Jesse Love.)

Court: Do you have any further objection?

Mr. McCaffery, Jr.: No, I have made mine.

Court: Objection is sustained.

Mr. Garlington: Your Honor, in view of the Court's ruling, we would like to submit an offer of proof.

Court: Very well.

DEFENDANT'S OFFER OF PROOF No. 1

"The defendant offers to prove by the witness Jesse Love that the car A-16 Touralux on which the plaintiff was riding was equipped with an electric bell signal system by which the plaintiff riding in Section 12 could have pressed a button near each seat light in the section which would have sounded a signal to the porter. That had the plaintiff pressed the bell signal button, the porter was in the car and would have responded to her signal, and would have hung up the plaintiff's hat and coat and assisted her in any such respect that she might have requested."

Mr. McCaffery, Jr.: The plaintiff objects to the offer of [222] proof—I take it it is the Defendant's Offer of Proof No. 1?

Court: It will be Offer of Proof No. 1.

Mr. McCaffery, Jr.: On the following grounds and for the following reasons: first, that on the offer of proof assumes a state of facts which have not been shown to exist by the evidence; in fact

(Testimony of Jesse Love.)

some of the testimony that has gone in by the defendant's own witnesses show the very high probability that the porter was not present in the car. The offer of proof is further objected to on the grounds and for the reasons that it is negative testimony in this: that it assumes what would have been done if the porter were present in the car and if the plaintiff or someone in her behalf had rung a bell and if, under his own language, the porter felt that it was in the bounds of reason, he would respond to the bell. Further, that it raises issues not framed by the pleadings and proposes testimony irrelevant to the issues here framed.

Mr. Pauly: As to the first two points, your Honor, the testimony has already clearly indicated here, as given by Mr. Love himself, that he was present in the car at all times from the time he left Seattle until the time he was first informed by some stranger that this woman had been in an accident, except for the time he was on the station platform at Renton. As to counsel's statement that it depends upon the witness' attitude as to whether he deemed it reasonable to respond to the signal, it is not supported by the testimony. There was [223] nothing said regarding that at all by the witness. He testified, if my memory serves me correct, it was part of his duty to respond and inquire what the passenger wanted, and in addition, to comply with any reasonable request, but not that he would respond to the call, alarm, or signal if he deemed it rea-

("Testimony of Jesse Love.)

sonable. To that extent, counsel has misunderstood the evidence in at least two respects. As to the materiality of the defense, it is pertinent (Interrupted).

Court: Isn't the purpose of the evidence here to show what services were available, is that right?

Mr. Pauly: Yes, your Honor, and to show, if admitted, if the button was pressed, he would go and inquire what the passenger wanted, and if requested to hang up the coat, then to determine from him what he would have done.

Court: I don't know, and no one knows whether or not the porter would respond to any particular signal, and for you now to come in and have the porter testify of course he would is not competent evidence. As I see it, you have set up the facilities that are available and his duties with reference to it.

Mr. Pauly: He has testified he has been a porter, I believe, for 27 years, and I believe that it is entirely proper in the light of that to ask him what does he generally do in such a situation and what he would have done here if use had been made of that button—yes, precisely to show what facilities [224] were available to the plaintiff.

Mr. McCaffery, Jr.: If the Court please, further, I anticipated something like this when I prepared my brief, and I have given the Court authorities on the admissibility of evidence of customs and customary activities of porters and people of that nature. This is trying to establish by conjecture

(Testimony of Jesse Love.)

what he would have done; it is negative testimony of the first water; it has no probative value. We insist on those two grounds, that to establish by custom what he would have done is not within the issues of this case. They are merely trying to put in what they can argue to the jury. They have shown what the custom is, let them argue that to the jury.

Court: The objection is sustained. Is that the ruling with reference to the offer of proof No. 1?

Mr. Garlington: That is our understanding.

Court: The objection to the offer is sustained.

Q. Directing your attention, Mr. Love, to the time during which the train that we are referring to, to the time that elapsed between the time that train left Seattle and the time when this stranger informed you Mrs. Harrington had been in an accident, let me ask you in general what you were doing during that time?

A. I was back in the rear of the car straightening out some linen in the locker at the particular time.

Q. At the particular time of what? [225]

A. That the accident occurred.

Q. Previous to that time and between that time and the time you left Seattle, what had you been doing in general?

A. Placing away baggage and straightening passengers out in the seats.

Q. You were in the car at all times except for

(Testimony of Jesse Love.)

the time you were on the station platform at Renton, were you?

Mr. McCaffery, Jr.: To which we will object as leading and suggestive.

The Court: Sustained.

Q. Do you know, Mr. Love, whether during any part of that time from the time you left Seattle until you first learned of the accident—withdraw the question. During the time from the time the train left Seattle and the time you first learned of Mrs. Harrington's accident, let me ask you if you were on your feet during all that time?

A. I was.

Q. Do you recall whether or not during the time the train traveled from Seattle to the time when you first learned of Mrs. Harrington's accident, whether any unusual lurches or jerks occurred in the motion of the train?

A. I do not.

Q. Do you recall whether there were any sudden or unusual jerks in the movement of the train as it left Renton?

A. No, sir. [226]

Cross-Examination

By Mr. McCaffery, Jr.:

Q. Mr. Love, with whom have you talked concerning the evidence which you were going to give in this case?

A. I didn't get the question.

(Question read back by reporter.)

A. No one.

(Testimony of Jesse Love.)

Q. You haven't talked to a soul?

A. No, sir.

Q. You haven't talked to Mr. Pauly, counsel for the defendant?

A. I have talked to him, but I didn't tell him what I would give in evidence.

Q. You didn't tell him what you were going to say here? A. No.

Q. He put you on the stand without talking to you? A. Yes, sir.

Q. Did you talk to any of the train crew, Mr. Love?

A. Did I talk to any of them concerning this?

Q. Yes.

A. I talked to the conductor after it happened.

Q. After it happened? A. Yes, sir.

Q. Have you talked to him since you were subpoenaed here as a witness?

A. Not concerning that; we talked that over before. [227]

Q. And, if I understand you correctly at this time, Mr. Love, you have not talked with anyone, the investigator for the railroad company, the attorney for the railroad company, or any members of the train crew concerning the evidence which you were going to give in this case?

A. No, sir.

Q. Now, Mr. Love, do you recall the time that you left Seattle on the 26th day of August, 1947?

A. Yes, sir.

Q. What time?

(Testimony of Jesse Love.)

A. I think it was around 2:45 the time the train left Seattle.

Q. Do you recall the number of persons who were riding in your car?

A. No, sir.

Q. What did you say? A. No, sir.

Q. What time after your departure from Seattle, Mr. Love, do you usually go to lunch?

A. Four o'clock.

Q. Four o'clock. And the dining room is open to the public at which time?

A. Five o'clock.

Q. Mr. Love, if there is a commotion in your car, and you are there, you would be aware of it, wouldn't you? A. If I know it, yes. [228]

Q. I am not relegating this, Mr. Love, to your actually seeing it—— A. Yes, sir.

Q. If there were a commotion in your car, you would be aware of it, wouldn't you?

Mr. Pauly: Just a minute. We should like to object to this as calling for speculation as to what would have gone on in line with the objection of counsel as to the testimony of things that might or might not have occurred, and which the Court has already ruled may not be brought into evidence. We further object for the reason it would be improper cross-examination since those matters were excluded.

The Court: Sustained.

Q. Mr. Love, was there any commotion on your

(Testimony of Jesse Love.)

car between the time when you left Seattle and the time when you were called by the conductor or told by the stranger that Mrs. Harrington had had a fall? Was there any commotion in the car?

A. Yes, there was, yes, sir.

Q. That is the point I am trying to get at. Did you respond and immediately go to the scene of the commotion?

A. After I was told, I did.

Q. I see. That is all I wanted to know. Now, during that period of time, Mr. Love, in August of 1947, travel was very heavy, was it not?

A. Yes, sir. [229]

Q. Your duties were very onerous at that time—withdraw that. Your duties were very heavy, you were working all the time, weren't you?

A. Yes, sir.

Q. Many passengers wanted considerable service, is that correct?

A. Yes, sir.

Q. How is it, Mr. Love, that you can definitely say to this Court and this jury that there was no one seated in Section 12 when you came on the section with Mrs. Harrington and her daughter?

A. Why, there wasn't.

Q. And you remember that very distinctly?

A. Yes, sir.

Q. You also remember taking them on to the car A-16?

A. Yes, sir.

Q. And you remember distinctly having seated Mrs. Harrington and her daughter?

(Testimony of Jesse Love.)

A. Yes, sir.

Q. And you looked at their travel tickets and accommodations? A. Yes.

Q. It is customary that you do so as they come to the train, isn't it? A. Yes, sir.

Q. But you do not remember escorting them from the platform [230] to the car?

A. Yes, sir.

Q. Now, you ride that train how often, once a week a complete trip back and forth or (interrupted).

A. Well, I did every eight days.

Q. Every eight days and you are willing to testify that you don't recall a jerk on this particular trip? A. Yes, sir.

Q. Do you recall a jerk on any trip?

A. On any trip?

Q. Yes. A. Sure.

Q. Which trip would you recall a jerk on?

A. I don't quite get you.

Q. Just tell me one trip you recall a jerk on.

A. Sometimes it is a little jerk, but it is a very smooth train.

Q. A very smooth train? A. Yes, sir.

Q. If there were a severe jerk, it would be unusual, wouldn't it, Mr. Love? A. Yes, sir.

Q. Do you recall the length of the stop at Renton on that day? A. Yes, sir.

Q. How long was it? [231]

A. We stopped there a couple of minutes, I suppose.

(Testimony of Jesse Love.)

Q. Did you open your vestibule door and put down your (interrupted).

A. I stepped down.

Q. What do you call that?

A. Stepping box.

Q. Stepping box. You put that out?

A. I didn't put it out, there was no one coming back.

Q. But you yourself did get down on the platform that day at Renton? A. Yes, sir.

Q. Now, at Renton, Mr. Love, you say you got out? A. Yes, sir.

Q. Then, you would get out at that section of the train or your car beyond Section 14, wouldn't you? A. Yes, sir.

Q. You testified, Mr. Love, that you were back at your linen box when this person told you that Mrs. Harrington had had a fall? A. Yes, sir.

Q. Your linen box is beyond Section 2 to the forward end of the train? A. Rear end.

Q. The rear end. Then, Mr. Love, in order to get back on the train and get back to your linen box, you had to pass the [232] section in which Mrs. Harrington was seated? A. Yes, sir.

Q. You observed nothing?

A. Nothing.

Q. You went right by? A. Yes, sir.

Mr. McCaffery, Jr.: That is all.

(Witness excused.)

CARROLL P. PARKER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pauly:

Q. State your name, please.

A. Carroll P. Parker.

Q. Where do you live?

A. Seattle, Washington.

Q. Are you employed by the Milwaukee Railroad?

A. I am.

Q. In what capacity?

A. Conductor.

Q. What kind of conductor?

A. Train conductor.

Q. Were you so employed in August, 1947? [233]

A. I was.

Q. How long have you been employed by the Milwaukee Railroad as train conductor?

A. I beg your pardon.

Q. How long have you been employed by the Milwaukee as train conductor?

A. Since November, 1909.

Q. You have been train conductor continuously since 1909?

A. Well, that was my date. Of course, there was times when I was on the extra list, but I have been continuously employed quite a number of years.

Q. As train conductor?

A. Yes.

Q. Your service date begins as train conductor in 1909?

A. Yes, sir.

(Testimony of Carroll P. Parker.)

Q. You have been regularly employed since then as train conductor? A. Yes, sir.

Q. State whether or not you were a train conductor on train 16 leaving Seattle August 26, 1947?

A. I was.

Q. Do you recall that is the train on which Mrs. Harrington claims to have suffered an accident?

A. I do.

Q. Did you yourself see the accident? [234]

A. I did not.

Q. How did you first learn there had been such accident? A. Mr. Nolan informed me.

Q. Who was Mr. Nolan?

A. The sleeping car conductor.

Q. Do you know how long it was after leaving Seattle that you were so informed by Mr. Nolan?

A. I do not.

Q. Do you know where the train was when you first were informed by Mr. Nolan the accident had occurred?

A. I can't recall that, either.

Q. Do you recall what you were doing at the time you were so informed by Mr. Nolan?

A. I don't recall that right at this time.

Q. What is your ordinary practice after leaving Seattle, what would you do?

A. I start lifting the tickets in the day coaches.

Q. Is that part of your ordinary functions?

A. Yes, it is.

Q. Do you collect tickets in the day coaches?

(Testimony of Carroll P. Parker.)

A. Yes, sir.

Q. As conductor, let me ask you if you have general authority and responsibility over the train?

A. I do.

Q. Is that restricted to the day coach section, or does it [235] extend to the entire train?

A. Entire train.

Q. Do you know what cars made up your train on that day? A. I do.

Q. Would you please tell us what cars were in the train and list them in the order in which they were placed, beginning with the locomotive and moving toward the rear?

A. Mail and express car, dormitory car, three coaches, tap, or club car, as it is sometimes called, three tourist cars, dining car, standard sleeper and sleeper observation car.

Q. After leaving Seattle you boarded the train at the head end? A. Yes, sir.

Q. And collected tickets? A. Yes, sir.

Q. How long does that ordinarily take you to collect tickets in the day coach section?

A. Depending on the load, it figures any time from 30 minutes on, depending on how heavy the load is on the cars.

Q. Do you recall whether you were still collecting tickets at the time Mr. Nolan informed you Mrs. Harrington had been in an accident?

A. I don't recall, no.

Q. What did you do upon being informed by

(Testimony of Carroll P. Parker.)

Mr. Nolan that there had been an accident? [236]

A. I went back to see what the nature of the accident was and inquire, get what facts I could of the nature of the accident and how badly the person was injured if it could be determined.

Q. Where did you go?

A. I went back to car A where the passenger was.

Q. Do you recall who else was there at the time you arrived?

A. No, I don't recall now who was there.

Q. Mrs. Harrington was there, of course?

A. Yes, she was.

Q. Was her daughter there, do you know?

A. I don't know definitely. I think she was, but I don't know definitely.

Q. Mr. Nolan was with you, was he not?

A. Yes.

Q. Anybody else that you recall?

A. No, I don't recall now.

Q. Reference has been made here to a person as being dressed in gray and who was referred to as Passenger Representative. Do you know whether there was any such person on the train that day?

A. I don't recall that.

Q. Are you familiar with Passenger Representatives in general?

A. They are generally on the trains—they were when they put that train on. They were on there for two or three months, but they are not on there

(Testimony of Carroll P. Parker.)

now, and they were merely on there to observe, more to acquaint themselves—— (interrupted).

Mr. McCaffery, Jr.: Just a minute, please, Mr. Parker. We would like to have anything he would further say stricken as not responsive to the question.

The Court: It isn't responsive. Ask a direct question if you want to elicit some information and give counsel an opportunity to object.

Q. Just confine your answers to my question. I will ask you now was a passenger representative ever a part of the train crew itself?

A. No.

Q. Could the Passenger Representative at the time there was such person riding on the train have anything to do with respect to the operation of the Train 16? A. None.

Mr. McCaffery, Jr.: To which we will object as irrelevant, immaterial; it doesn't prove or tend to disprove any of the issues in the case.

The Court: What is the purpose of it?

Mr. Pauly: To show simply, your Honor, the fact of the matter is, if I may be permitted to indicate it, and to shorten this matter, maybe counsel will agree that the Passenger Representative wasn't part of the train crew or an official on this train; he was a passenger just like anyone else.

The Court: The testimony is that he was performing official [238] duties on the train.

Mr. Pauly: To this extent, and this is what I in-

(Testimony of Carroll P. Parker.)

tended to elicit from this witness: It is a fact he is a representative of the railroad at other points, just like reference has been made to Mr. Tansley in San Francisco. When the train was first put on, it was thought advisable to have Passenger Representatives take a trip on the train to advise themselves of the facilities. That was his purpose. He was a salesman. He had no duties to perform there except to inform himself regarding the facilities. I think an impression has been created that he was a person such as compared to the train conductor and himself had some duties to perform on this train. Frankly, we have no such person here, and I don't like to create the impression that there is some party here who would have some bearing on the case that we haven't presented. He was like any other passenger.

The Court: I don't see whether it is material whether the Passenger Representative was on the train or not on the train. I don't see it is of any importance one way or the other.

Mr. McCaffery, Jr.: We will admit that for the purpose of this examination under the circumstances, why he was there, and in that capacity as stated by Mr. Pauly.

Mr. Pauly: All right.

The Court: Very well.

Q. Did you have any conversation with Mrs. Harrington, Mr. [239] Parker?

A. Yes, I did.

(Testimony of Carroll P. Parker.)

Q. When?

A. When I went, was called back to her section.

Q. Did she make any explanation as to what had happened?

A. She had slipped and fallen in her section there.

Q. Was any reference made by her to any jerk?

A. Not that I recall.

Q. Did you have any conversation with Miss Harrington, the daughter, do you know?

A. I don't recall that I did that.

Q. Did you inquire as to when the accident had occurred?

A. Yes, I tried to.

Mr. McCaffery, Jr.: Just answer the question.

Q. Was any reply made by Mrs. Harrington as to when it had occurred?

A. She didn't know definitely.

Q. Did you, Mr. Parker, inquire as to whether or not any of the passengers in the vicinity had witnessed the accident?

A. I did.

Q. Were you able to ascertain the names of any people who had witnessed the accident?

A. I found none who had witnessed the accident.

Q. None at all, A. None at all. [240]

Q. What else did you do while you were there at Section 12, Mr. Parker, if anything?

A. I inquired, made inquiries. I made inquiries as to what happened and tried to determine the approximate time that it happened and asked those questions of Mrs. Harrington.

(Testimony of Carroll P. Parker.)

Q. Did I understand you were not able to fix the time? A. No, we weren't.

Q. Do you recall whether the porter was in the car at the time? A. No, I don't.

Q. Did either Mrs. Harrington or Miss Harrington at that time request any medical attention?

A. They did not.

Q. Did you offer to provide any medical attention? A. Yes, sir.

Q. What did they say in answer to your offer to provide medical attention?

A. They didn't feel it was necessary.

Q. Did either Mrs. Harrington or Miss Harrington request that the berth be made down?

A. Not to me.

Q. Well, did they to anybody else that you know of?

Mr. McCaffery, Jr.: Just a minute, in your presence.

Q. In your presence at that time?

A. No.

Q. Did you make any inquiry as to whether they wished to have [241] the berth made down at that time? A. No, I did not.

Q. Do you know whether anybody else in your presence made inquiry of them whether they wanted the berth laid down at that time?

A. Not that I heard.

Q. Did you, at any later time, receive a request, either from Mrs. Harrington or Miss Harrington,

(Testimony of Carroll P. Parker.)

or from anyone else, to arrange for medical attention for Mrs. Harrington? A. Yes, sir.

Q. By whom were you requested to do so?

A. The sleeping car conductor.

Q. How long afterwards was that after you first went down to Section 12?

A. I don't recall now.

Q. Can you tell us approximately at all?

A. No, I don't recall how long afterwards.

Q. Did you arrange for medical attention?

A. I did.

Q. How?

A. By sending a message to Spokane to have the doctor meet the train there.

Q. Do you know where that message was sent?

A. Where I put the message off?

Q. Yes. [242] A. At Othello.

Q. Did a doctor afterwards meet the train at Spokane in accordance with your request?

A. I understand there was.

Q. You didn't see him?

A. No, I didn't see him.

Q. Mr. Parker, directing your attention to the time that elapsed between the time the train left Seattle and the time you first learned Mrs. Harrington had been injured in an accident, let me ask you whether you remember whether the train suffered any unusual jerks or lurches of any kind?

A. It did not.

Q. Did the train stop at Renton, do you know?

(Testimony of Carroll P. Parker.)

A. Yes, sir.

Q. Do you know whether or not there was any unusual or extraordinary lurch or jerk as the train left Renton? A. There wasn't.

Mr. Pauly: That is all.

Cross-Examination

By Mr. Myers:

Q. Mr. Parker, with whom have you discussed your testimony in this case?

A. With our attorneys.

Q. With the attorneys? [243]

A. Yes.

Q. Was this prior to your being subpoenaed in this case or was it afterwards?

A. Afterwards.

Q. Has there been a discussion within the last few days? A. Yes, sir.

Q. With your attorneys was this discussion individual, or were other members of the train crew present?

A. There were other members present.

Q. Was Mr. Love present?

A. No, Mr. Love was not present.

Q. Where was Mr. Love at that time, do you know? A. I wouldn't know.

Q. Were all other members of the crew present except Mr. Love? A. No, sir.

Q. Which ones were present?

A. We have had several discussions and different members at different times.

(Testimony of Carroll P. Parker.)

Q. Have you discussed the testimony in the case generally with other members of the train crew in the absence of your attorneys? A. No.

Q. There has been no discussion among any of you at any time relative to this case?

A. There has been discussions, but not relative to the testimony. [244]

Q. You have, however, within recent days discussed the case with other members of the train crew? A. I have.

Q. Have you discussed it with Mr. Love?

A. Yes, I have.

Q. Have you discussed various facts of the case as in your own mind they came out with Mr. Love? A. No, I wouldn't say that.

Q. But there has been discussion of what the facts of the case were with Mr. Love, is that right?

A. Yes.

Q. You say you have jurisdiction over the entire train, is that correct? A. Yes, sir.

Q. And when the train left Seattle on the day this accident occurred, you were lifting tickets in the day coaches? A. That's right.

Q. But you don't remember how long it was before you were told of the accident by Mr. Nolan?

A. No.

Q. You don't have any idea how long that was?

A. No.

Q. Do you remember which of the three coaches you were in at the time he came to get you? [245]

(Testimony of Carroll P. Parker.)

A. No, I don't.

Q. You don't remember that? A. No.

Q. You went back with Mr. Nolan to Car A-16 to check on the accident? A. Yes, sir.

Q. You don't remember whether Miss Marjory Harrington was there at the time or not?

A. No.

Q. You don't remember whether Mr. Love, the porter, was there?

A. No, I don't recall that.

Q. You don't recall whether the Passenger Representative, to whom there has been some reference in this case, was there at the time?

A. No, I don't recall that.

Q. You don't remember whether Mrs. Harrington made any reference to a jerk in connection with her fall? A. I don't recall she did.

Q. As a matter of fact, your recollection of that incident is pretty vague, isn't it?

A. I beg your pardon?

Q. Your recollection of that whole incident and surrounding circumstances is pretty vague; it was some time ago and your memory has faded quite bad? A. Yes. [246]

Q. Do you recall how long you talked to Mrs. Harrington when you first went into the car?

A. I don't recall that.

Q. After your conversation with her, you proceeded to look for witnesses, is that correct?

A. Yes.

(Testimony of Carroll P. Parker.)

Q. Most of the time you were in the car, you were asking other people in the car if they had seen the accident? A. Yes.

Q. You checked all of them?

A. Not all of them.

Q. You asked all you could see there at the time?

A. That's right.

Q. And none of them had seen the accident?

A. That's right.

Q. After this visit to Car A-16, did you return to it at any time? A. Yes, sir.

Q. Did you return to see Mrs. Harrington, or was it in connection with other matters?

A. In connection with other matters and—yes, in connection with other matters.

Mr. Myers: That is all.

Court: Just a minute. What are your duties, Mr. Parker, on the train with reference to the train when it comes to a [249] station and stops?

A. That would depend on what that stop was for. If it were just general, I would supervise to see if we have passengers to put off, usually.

Court: See that the passengers supposed to get off, do get off?

A. And if there is any to load.

Court: Is it your responsibility to start the train then?

A. Yes, it is, well, it is if I am available, but if I am back in the train, the trainmen, they are up

(Testimony of Carroll P. Parker.)

ahead loading or unloading passengers, as at Renton, they are qualified to start that train.

Court: You didn't get off at Renton on that trip?

A. I did not.

Court: You recall that definitely, do you, that you didn't get off there?

A. Yes, I do.

Court: Does anything in particular call it to your mind that you didn't get off there on that day?

A. Yes, because I usually go to the vestibule, I always do, and open it and look up ahead. I don't step off on the ground. I do look up to the head, and if I am not there in person, I am up there where I can look back.

Court: Did you do that on this trip?

A. Yes, sir. [249]

Court: Any further questions?

Mr. Pauly: No.

Mr. Myers: Just a moment.

Court: What time was it when you went back and saw Mrs. Harrington?

A. I don't recall that.

Mr. Myers: Your Honor, I wonder if we might ask another question in connection with the Renton stop?

Court: Yes.

Q. (By Mr. Myers): Do you recall how long the stop was at Renton, Mr. Parker?

A. No, I don't.

(Testimony of Carroll P. Parker.)

Q. Do you know whether any passengers were discharged or picked up at Renton?

A. There were none discharged, and there were some picked up.

Q. There were some picked up? A. Yes.

Mr. Myers: That is all.

(Witness excused.)

(15-minute recess.)

GEORGE EDWARD TIERNEY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows: [250]

Direct Examination

By Mr. Pauly:

Q. State your name, please.

A. George Edward Tierney.

Q. Where are you from?

A. Tacoma, Washington.

Q. Are you employed by the Milwaukee?

A. Yes, sir.

Q. In what capacity? A. Engineer.

Q. What kind of engineer?

A. Locomotive engineer.

Q. How long have you been so employed?

A. I was a locomotive engineer in 1906.

Q. Have you been a locomotive engineer ever since? A. No, sir.

Q. Explain your answer.

A. Business slackened up in the spring of 1907.

(Testimony of George Edward Tierney.)

and I had to fire until they started to build the extension.

Q. How long have you been continuously employed as a locomotive engineer by the Milwaukee?

A. I have done no firing since August 7, 1907.

Q. Have you been an engineer since then?

A. Yes.

Q. Were you a locomotive engineer on Train 16 leaving Seattle [251] August 26, 1947?

A. Yes, sir.

Q. Are you now an engineer on the Olympian Hiawatha? A. Yes, sir.

Q. Have you been an engineer on that train ever since the train was started in June, 1947?

A. Yes, sir, I went out the second day.

Q. Over what division or territory do you act as locomotive engineer on that train?

A. From Tacoma to Othello.

Q. How far is Othello from Seattle?

A. 189 miles, approximately. There may be a few tenths one way or the other.

Q. Do you have a schedule prescribed for that train as it operated August 26, 1947?

A. Yes, sir.

Q. Do you have it at hand? A. Yes, sir.

Q. Briefly, will you tell us what time the train was scheduled to leave Seattle? A. 2:45.

Q. Did it leave on time that day?

A. Yes, sir.

Q. What time was it scheduled to arrive at Renton? A. 2:09—3:09, excuse me. [252]

(Testimony of George Edward Tierney.)

Q. What is the distance from Seattle to Renton?

A. It is approximately 12 miles.

Q. Are there any stops made between Seattle and Renton? A. No, sir.

Q. What is the next stop after leaving Renton?

A. Othello.

Q. That is the end of the division?

A. Yes, sir.

Q. Do you know whether or not that train on that day made any unscheduled stops?

A. They made no unscheduled stops.

Q. Will you explain how you know that? Are you testifying from personal recollection or what?

A. No, sir.

Q. What is your answer based on?

A. For the purpose of the Master Mechanic, the engineers make a delay report. It is for the purpose of showing the efficiency of the engine, and on any stop that is not scheduled, we put down there a delay to give him credit.

Q. Do you report on there every stop of every kind whatsoever and regardless for what purpose?

A. No, sir, not a regular stop.

Q. I mean any unscheduled stop?

A. Any unscheduled stop, yes, sir.

Q. Did you make out a delay report of any kind for that trip? [253] A. Yes, sir.

Q. Do you have it with you? A. Yes, sir.

Q. Let me see it. Is that your handwriting?

A. Yes, sir.

(Testimony of George Edward Tierney.)

Q. Does it show any stops at all made by the train on that trip? A. No, sir.

Mr. McCaffery, Jr.: Just a minute.

Mr. Pauly: Were you going to enter an objection?

Mr. McCaffery, Jr.: I think the witness had very definitely evidenced a personal knowledge, which the use of a memorandum to refresh his recollection is not indicated.

Mr. Pauly: I am trying to develop the fact his testimony is based on his personal memorandum.

Mr. McCaffery, Jr.: I think he has indicated ability without the memorandum.

Court: Are you testifying with reference to the stops from your memory?

A. It was from this. I couldn't remember back two years and a half. I don't even remember this trip.

Q. Was the memorandum made out by you at the conclusion of that trip? A. Yes, sir.

Q. Was it correctly made out at the time? [254]

A. Was it what?

Q. Was it correctly made out?

A. Yes, sir.

Q. That memorandum shows, does it not, that there were no stops?

Court: Here I think you are confusing the purpose of the memorandum. I think the witness is not using the memorandum to refresh his recollection; he has no memory of the trip at all.

(Testimony of George Edward Tierney.)

Q. We will approach it this way: I show you a sheet marked Defendant's Exhibit 3, and ask you if that is made out in your handwriting?

A. Yes, sir.

Q. Is that the delay report you have just referred to? A. Yes, sir.

Q. Does it show any stops made by train 16 between Seattle and Othello on the run leaving Seattle August 26, 1947? A. No, sir.

Q. If any unscheduled stop had been made by that train, you would have reported it on that sheet?

A. Yes, sir.

Mr. McCaffery, Jr.: Just a minute. We ask that the answer be stricken.

Court: It may be stricken.

Mr. McCaffery, Jr.: We object on the grounds and for the [255] reason it is calling for a conclusion of the witness; it is based upon custom and not what actually happened. Let him state what actually happened.

Court: Objection will be sustained at this point to further elicit the way he made the report, what happened, what he did.

Q. When was the report made out, Mr. Tierney?

A. In Othello.

Q. When?

A. That night when I got in, I had to check in at Othello where I made the reports out for that train, and then turned it in when I got back to Tacoma.

(Testimony of George Edward Tierney.)

Q. Is that turned in where? A. Tacoma.

Q. To whom? A. Master Mechanic.

Q. Of the Milwaukee Road?

A. Yes, sir.

Q. Is that such a report as you are required to make as engineer? A. Yes, sir, in every trip.

Q. Made in the course of the performance of your duties? A. Yes, sir.

Q. If any stop, unscheduled stop, had been made by you on that trip, would you have so noted on this report? [256] A. Yes, sir.

Mr. Pauly: We offer Exhibit 3 in evidence.

Mr. McCaffery, Jr.: Let me see it, Harry, please? May I ask in connection with this, if the Court please?

Court: Surely.

Examination

By Mr. McCaffery, Jr.:

Q. Is it not a fact, Mr. Tierney, that a ticker tape is run on your whole trip?

A. A ticker tape?

Q. Yes. A. Yes, sir.

Q. That describes precisely the movements of the train? A. Yes, sir.

Q. As to speed, stops, time and other elements?

A. Not the time.

Q. Would you say that would be an accurate record of the trip, the ticker tape?

A. Yes, sir.

Q. That is mechanical, isn't it, Mr. Tierney?

(Testimony of George Edward Tierney.)

A. The ticker tape is mechanical. If it is correctly adjusted, it would give an accurate account of the trip.

Mr. McCaffery, Jr.: We will object to the exhibit offered at this time, and its admission in evidence, on the grounds and for the reasons that it is not the best evidence. It is a self-serving declaration, but this objection does not go to the use [257] of the memorandum by the witness to refresh his recollection.

Court: It is of no value for that purpose because he has no recollection.

Mr. Pauly: Regarding the objection made as not being the best evidence available, there is no showing made and it is not a fact that any ticker tape is available.

Mr. McCaffery, Jr.: I think it is up to them to show where the ticker tape is.

Mr. Pauly: No, on the basis of the evidence, it is not. Certainly it is up to them to show—— (interrupted).

Court: I don't think the objection to it based on the basis it isn't the best available evidence can be sustained. It is admitted for what it is worth. It is for the jury, under instructions of the Court, to decide its value and weigh it. The objection to the admission is overruled. Defendant's Exhibit 3 is admitted.

(Testimony of George Edward Tierney.)

DEFENDANT'S EXHIBIT 3

"Form 188

'78 Report'

Passenger Train Delay Report

8-26 1947

To Train Dispatcher

A Train No. 16 Engine No. 6

B Left Tacoma

OT

(Starting Point)

(Time Late)

C Arrived Othello

OT

(End of Run)

(Time Late)

D Delayed at Mile Post 2079

5 min.

Slow order

(Station)

(Time)

(Cause)

Renslow to Boyleston

7 min.

No. 264

F Remarks: 12 cars.

s/ Geo. Tierney

Engineer
Conductor

Note.—Passenger Train Engineers will fill out this report and leave with operator at end of run. All delays in excess of the schedule or usual stop must be reported, such as getting orders, passing trains, at stations loading baggage, mail and express, hot bearings on engine or cars, etc., giving location and time delayed. Operator will telegraph report to Train Dispatcher promptly using signal '78' and letters A, B, C, D and F for lines as indicated.

Filed Oct 25, 1949, H. H. Walker, Clerk, By D. F. Holland, Deputy."

Direct Examination

(Resumed)

By Mr. Pauly:

Q. Mr. Tierney, do you know whether or not the train on that day operated on time and in accordance with the schedule prescribed for it?

A. That's right.

Court: Counsel, I don't want to inject the Court too much into it, but the witness has testified, has

(Testimony of George Edward Tierney.)

he not, that he has no recollection of this trip. Is not that the evidence? That is the way I understood it.

Mr. Pauly: I just asked him whether or not he knows whether the train on that day operated in accordance with the schedule. I don't know whether his previous answer covers that situation, your Honor.

Court: I will permit the answer at this point.

Mr. Garlington: I think it appears from the Exhibit 3, if these hieroglyphics can be properly interpreted.

Court: It is admitted for the jury, but he has no recollection of it, he says.

Mr. Pauly: My last question was whether or not he knows whether the train was on schedule.

Court: He has already said he doesn't; he doesn't have any recollection of the trip.

Mr. Pauly: Your Honor, a broad general statement that he has no recollection of the trip, I don't know whether that is intended to cover this: Was the train on schedule or not? That is what I intended to elicit from the witness. Do you know of your own knowledge whether or not the train was operated on schedule?

A. My work report, delay report, says it was.

Q. Will you explain how it shows that?

A. It says, "Left Tacoma on time."

Q. Does it say, "on time." A. O.T.

Q. That stands for on time? A. Yes, sir.

(Testimony of George Edward Tierney.)

Q. What else?

A. What else? It says, "Othello, on time."

Q. Does it show anything with regard to what the time of the train may have been at any point between Tacoma and Othello? [260]

A. No, sir.

Q. The statement on Exhibit 3, "Mile post 2079, five minutes," what is that following that?

A. Slow order.

Q. What does it say following that?

A. Renslow to Boyleston, 7 minutes, No. 264. That means they were ahead of us and we had to slow up to allow them to clear.

Q. Where is Renslow?

A. The second station out of Ellensburg.

Q. East or West? A. East.

Q. Approximately how many miles from Seattle?

A. From Seattle, 90 and——(interrupted)

Q. Approximately?

A. It would be 115, 121—between 125 and 130 miles.

Q. Other than as shown by Exhibit 3 there, are you able to tell us of your own knowledge whether or not Train 16 operated on schedule at points located between Seattle and Othello?

A. Yes, sir, outside of there might have been a minute or two late on account of the five-minute slow order; that would naturally retard the train.

Q. That would be after the train was at a point East of Seattle?

(Testimony of George Edward Tierney.)

A. No, that is just out of Cle Elum.

Q. How far is Cle Elum from Seattle?

A. It is 89. [261]

Q. Except for those two delays, the train was otherwise on time? A. As far as I know.

A. Is that correct? A. Yes, sir.

Court: I would like to clear this up, counsel, for the benefit of the jury. Do you remember this, that the train was on time at any particular point?

A. This particular trip?

Court: Yes.

A. No, sir.

Court: The witness has said he has no recollection of the trip.

A. There was nothing unusual happened on the trip.

Q. (By Mr. Pauly): Do you know what kind of a locomotive you had that day, Mr. Tierney?

A. Yes, sir, a Diesel locomotive.

Q. Can you further identify it as to type?

A. Fairbanks-Morse Diesel, three unit.

Q. Is that a large or small engine?

A. Large.

Q. Is it a new or old engine?

A. It was a new engine.

Q. Would you describe it as to general type as being a Diesel-Electric? [262] A. Yes, sir.

Q. And would you describe to us how the train is put in motion, with what facilities is the train put in motion?

(Testimony of George Edward Tierney.)

A. Well, you see, there is three units to the Diesel, and each one is separate, but they are operated by the same control.

Q. Yes.

A. And when you are standing, your Diesel engine is idling at about 300 revolutions, between 300 and 315, and you place your throttle on the first notch—you have eight notches. The first notch does not speed your engine up, but merely connects what electricity you have, throws it to the traction motor which propels the Diesel.

Q. And puts it in motion.

A. Puts it in motion. If one notch isn't enough, which is not very likely, you put it in the second, and that speeds your engine up and you bring up a little more voltage.

Q. As the control is moved from one notch to the next and on up to the eighth position, do I understand more power is applied to the wheels?

A. With each notch the revolutions of the engine increases.

Q. And as a result of the increase in the revolutions in the engine, what, if anything, results regarding electric power?

A. You make more voltage.

Q. That results in more power being applied to the wheels, does it? [263] A. Yes.

Q. In starting the train from a stop, do you advance the throttle from notch to notch?

A. Yes, sir.

(Testimony of George Edward Tierney.)

Q. Is that a gradual and successive application, or do you advance it several notches at a time?

A. Just one.

Mr. McCaffery, Jr.: Just a minute please. We will object to the question on the grounds and for the reasons it is not connected with the factual situation presented in the trial of this case; it merely seeks to elicit from the witness what a custom is, and it would tend to confuse the jury unless the custom is connected with the actual occurrence on the train during the trip upon which Mrs. Harrington was a passenger.

Court: As I understand it, the witness is just testifying as to how the Diesel locomotive operates.

Mr. Pauly: Yes, the general procedure in putting it in motion, and I do intend to connect it up by asking him if he always follows that practice, which would certainly, of necessity, apply to this particular train.

Mr. McCaffery, Jr.: With that amplification, we certainly would add the further objection of this question, which is merely a foundation question, that the testimony and the line of testimony which counsel for defendant seeks to establish by this witness on the stand merely goes to what the custom is [264] and to directing the witness' attention to what his custom is rather than to the factual situation as to what was actually done, and as such it is irrelevant and immaterial, encumbering the record, and it does not prove or tend to prove any issues in this case.

(Testimony of George Edward Tierney.)

Mr. Pauly: Your Honor, he has testified he has no personal recollection as to this particular trip. Certainly, in that event, it is proper to elicit from the witness if there is a general practice, what it is, and in addition to that, determine from him whether he has ever deviated from that practice in making any start. I grant if it should develop he has deviated, then the testimony should be stricken, but if it should appear there is a practice that he has never deviated from at any time, it should apply to this particular case.

Court: If he doesn't recall the trip at all, how can he recall or know whether he has deviated from the practice?

Mr. Pauly: If he can recall he has never deviated and knows he has not, it seems to me it would be admissible.

Court: The Court will consider the matter.

(Whereupon, a recess was taken until 1:30 o'clock, p.m., the same day, October 21, 1949, at which time, the jury and counsel for both parties being present, the following proceedings were had:)

Court: The objection is overruled. You may proceed along that line and establish the testimony with reference to his operation of the train, his customary operation of the train. [265]

(Testimony of George Edward Tierney.)

Q. (By Mr. Pauly): Mr. Tierney, do you recall the question, or do you want it repeated?

A. I would like to have it repeated.

(Question and answer read back by reporter as follows: "Question: Is that a gradual and successive application, or do you advance it several notches at a time? Answer: Just one.")

Q. Have you ever advanced the throttle to full position in one movement? A. No, sir.

Mr. McCaffery, Jr.: Just a minute. We will ask the answer be stricken.

Court: It may be stricken.

Mr. McCaffery, Jr.: We will object to this as calling for conjecture of the witness; it doesn't prove or tend to prove any issues in this case; it is not related to the incident which the jury is called upon to determine; it is an invasion of the province of the jury; it precludes human error.

Court: Overruled.

Q. Do you recall the question?

A. I answered it; yes. I said no. You asked me if I ever advanced it wide open, didn't you?

Q. In one movement, yes. A. I said no.

Q. Have you ever advanced the throttle in making a start more than one notch at a time? [266]

A. No, sir.

Mr. McCaffery, Jr.: May our objection go to this evidence in its entirety as already made?

Court: It may be so understood.

(Testimony of George Edward Tierney.)

Q. Mr. Tierney, tell us if you will, please, whether or not a Diesel locomotive of the kind you operated on that day, and whether that locomotive particularly, is equipped with a governor of any kind? A. Yes, sir.

Q. Will you tell us what the purpose of the governor is?

A. The governor controls the speed of the engine, that is, in this way: It stops it from going too fast if anything should happen and if I should—I have never tried it, but I know that is what happens if you advance it like you say, it would retard the engine from going to full speed.

Q. In other words, if I understand you correctly, if a person were to attempt to open the throttle in one single motion without going through each successive notch, would the governor operate to intervene and regulate the speed of acceleration?

A. It would hold it down, yes, sir.

Q. Or rate of acceleration? A. Yes, sir.

Q. By advancing the throttle gradually from notch to notch, does that result in a gradual acceleration of the speed of the train? [267]

A. Yes, sir, it gives more power, it increases the revolutions of your engine and raises your voltage, and, naturally, you put more power to the traction.

Q. How long do you hold the throttle in each notch before moving it to the next?

A. Until you hear the speed of your engine will

(Testimony of George Edward Tierney.)

quit rising, you see what I mean, then you give it another one.

Q. I understand that is your consistent practice in the operation of this locomotive, is that true?

A. Yes, sir.

Q. And was your practice in August, 1947?

A. It has always been.

Mr. Pauly: During the recess, your Honor, counsel for the plaintiff and we have referred to various railroad records here available, and I think that having done so, we may now attempt to shorten this matter, both with this witness, and with others, by stipulation.

Court: Very well.

Mr. Pauly: I should like to state—and counsel, I wish you would pay attention and see if this is a correct statement—that it is stipulated between the parties that on August 26, 1947, the train involved in this lawsuit, Train No. 16, in proceeding from Seattle to Othello, the entire first division on the railroad, the train operated strictly in accordance with the established schedule which applied to that train at that [268] time, and that includes all intervening points, including Renton; that, confining it as much as possible to the section which likely is involved in this action, and between Seattle and Clue Elum, located approximately 90 miles from Seattle, and approximately two and a half hours on the time schedule, the maximum speed schedule permitted for this train varied from 30 to

(Testimony of George Edward Tierney.)

a maximum, at any point in that distance, of 55 miles an hour, and that the running time of this train, No. 16, as compared with the running time of the Olympian train, Nos. 17 and 18, which operate as a local train, excluding the stops made in between, and simply considering the actual running time, that the schedules for the two are approximately the same. Is that agreeable?

Mr. McCaffery, Jr.: The stipulation is agreed to, based upon the records submitted and prepared by the defendant company as their official records, and having been prepared and used in their business of railroading. We were not at any time raising an issue as to speed, but the defendant believed that the stipulation was necessary in connection with some testimony of the conductor, Mr. Nolan, so, so far as the stipulation is concerned, it is agreeable.

Court: Very well.

Mr. Pauly: That is all. [269]

Cross-Examination

By Mr. McCaffery, Jr.:

Q. Mr. Tierney, how long did you practice on this Diesel engine?

A. How long did I practice?

Q. Yes.

A. You mean how long did I run it?

Q. How long did you practice on it before you ran it? A. I didn't practice on it.

Q. I was adopting your use of the term that it

(Testimony of George Edward Tierney.)

was your practice in doing these certain things. You meant it was your custom and you had done that on all previous occasions. You weren't practicing on this engine at all?

A. No, sir.

Q. You said you took your first run on the new streamliner the second night out, which would make it the 30th of June, would it not?

A. Yes, sir, as I recall it, I went out the second night, the second afternoon.

Q. I am not trying to confuse you on the day you went, but I was just trying to recall what you did testify to on direct examination, Mr. Tierney.

A. I am pretty positive it was the second day.

Q. How many trips do you make a week?

A. Ten trips a month. [270]

Q. Ten trips a month. So, from the 30th of June, 1947, to the 26th day of August, 1947, you would have made approximately 26 trips—no, you would have made approximately 16 trips?

A. On this particular train?

Q. Yes. A. That is all the train run.

Q. That is correct, Mr. Tierney?

A. On this particular train, yes.

Q. This was a new train, was it not, Mr. Tierney?

A. Yes.

Q. Would you describe, Mr. Tierney, the effect which an application of your brakes to bring the train to a stop in a station would have if the train signal to proceed shortly after the train had arrived at the station were given by the conductor?

(Testimony of George Edward Tierney.)

Mr. Garlington: Objected to as improper cross-examination, as assuming facts which are not only not in evidence, but, as we understand it, not in issue in the case.

Mr. McCaffery, Jr.: They have gone into the mechanical operations of the train. We would like to understand the physical operation in the setting and releasing of brakes and starting the train in connection with advancing the throttle, as they have gone into.

Court: Overruled.

A. Just what is the question?

Q. Maybe I can state it a little plainer by creating a situation, [271] as we think it existed. You had a scheduled stop at Renton, did you not?

A. Yes, sir.

Q. You had to apply your brakes coming to the station at Renton? A. Yes, sir.

Q. You arrived at the station at Renton at a full stop? A. Yes, sir.

Q. If there were no passengers to be discharged at Renton, according to the testimony of the conductor, but passengers were taken on; now, if you got an immediate signal from the conductor, would your brakes have released by that time?

A. Immediately after stopping?

Q. Yes.

A. It takes the brakes about 10 seconds to release.

Q. If the brakes had not fully released, Mr.

(Testimony of George Edward Tierney.)

Tierney, would it be necessary for you to advance that throttle beyond one position?

Mr. Garlington: May our objection go to this line of examination in order that it may be not repeated?

Court: It may be so understood.

A. Well, I answer that, if the brakes hadn't fully released, you would advance to the first notch, and you would make a very easy start. If you was setting in the train, you wouldn't know it was moving. [272]

Q. In other words, that first notch would move it whether the brakes were set or not?

A. It wouldn't move with the brakes set. As they gradually released, the train would move off and you wouldn't know the train had started under those circumstances if you were on it.

Q. If, Mr. Tierney, there were a sudden or violent jerk, then, on that train, that would be unusual, wouldn't it?

A. I don't know how you could create a condition to make it.

Q. Have you ever ridden behind yourself?

A. No, sir. I would like to sometime.

Q. Then, would you tell me, sitting in the position as you are, and being the propelling force of that train, how you would determine what the pick-up of slack or any other condition which would create a jerk would be?

A. I can feel it.

Q. You can feel it?

A. Yes, sir.

(Testimony of George Edward Tierney.)

Q. Tell the jury, Mr. Tierney, what you would do, not usually, but when you find a slippery track, or when you have an excessive number of cars on your train? Do you still very gently move that little regulator to number one?

Mr. Garlington: We object to that on the ground it is improper cross-examination, assuming a hypothetical state of facts which has no apparent relation to this case.

Court: He is testing the witness' knowledge of the operation [273] of the train. I will overrule the objection.

A. What I would do if the track was slippery?

Q. The point I am trying to get at, Mr. Tierney, is this: The jury, after your direct examination, has the impression that at all times and under all circumstances, you regulate that train in the same manner. In other words, you take that little handle and you move it to one, and everything goes according to appointment. Now, tell them what you do if you run into slippery track, water on the track. Would you still move it to one and leave it there?

A. Put sand on the rail.

Q. All right. Would you advance it pretty fast to two? A. No, sir.

Q. You would wait for the engine to pick up?

A. No, sir, if she was slipping, she wouldn't go.

Q. Although the speed of your engine would be at a point to indicate considerable land speed, as you would call it, or mileage on your indicator, wouldn't it? A. On the number one notch?

(Testimony of George Edward Tierney.)

Q. Yes. A. No, sir.

Q. Let me state it a little differently: Would it advance your indicator indicating how fast your engine was turning over?

A. Not on number one. [274]

Q. Not on number one?

A. You just kick the power to the traction motor.

Q. In other words, that is your starting position?

A. Yes, sir.

Q. An advance to two can be made immediately, can't it? A. Yes, sir, it can.

Q. And an advance to three can be made immediately? A. In turn.

Q. Yes, in turn, but it doesn't take only a moment's hesitation at the figure or at the position on the regulator?

A. Before I can move it?

Q. Before you can move it to three?

A. I can move it up if I want to. You wait for your engine speed, you can hear it.

Q. That is the point I am trying to arrive at, Mr. Tierney. In other words, it should be done in the best practice in operating the engine, is that correct?

A. It can be done, you say?

Q. I said it should be done in the best operation of the locomotive to wait momentarily for the power of your engine to pick up? A. Yes, sir.

Q. What happens if you don't wait?

A. If you go out too fast, the governor takes

(Testimony of George Edward Tierney.)

care of it, it is supposed to. I have been told it would; that is what they [275] are there for.

Q. That is another mechanical device?

A. Yes, sir.

Q. Would there be any jerking of the train if that were to happen? A. No, sir.

Q. In other words, this train is jerk-proof?

A. Yes, sir, pretty near.

Q. Now, if you had a different number of cars on your engine at different times, it would change the normal practice, wouldn't it?

A. I don't see in what way.

Q. Well, if you have more weight or less weight behind your engine, it would regulate your speed and ability to pick up, wouldn't it?

A. Your grade comes into consideration.

Q. Yes, and the condition of the track comes into consideration, does it not?

A. Grade mostly.

Q. You have no concern with the condition of the track at any time? A. Certainly.

Q. In other words, traction, under your statement, I can't see would make any difference.

A. There is not enough traction placed on there in the first [276] or second notch to cause any slipping.

Q. To cause any slipping? A. No, sir.

Q. So, if the track were slippery, you would regulate it according to the traction which was developed by your driving wheels, wouldn't you?

(Testimony of George Edward Tierney.)

A. If the track was slippery, I would advance more carefully than if I had a good track.

Q. We have heard considerable testimony, Mr. Tierney, respecting what appeared on your memorandum that was turned into your employers. Also, for that purpose, you have heard it stipulated that the train was on time at Renton and at Cle Elum, and arrived on time, according to your recollection, at Othello? A. Yes, sir.

Q. You have also indicated that that train ticker would give us the best information concerning all of those factors, except time, haven't you?

A. Yes, sir.

Q. Now, do you have in your possession, or do you know who has, the train ticker?

A. No, sir.

Q. That train ticker would show the speed at which the train departed from Renton on that particular day, would it not?

A. It would be starting from a stop. [277]

Q. Yes.

A. It wouldn't be of any use to you that I could see.

Q. Would you let me be the judge of that. Do you know who has it in his possession, Mr. Tierney?

A. No, sir.

Q. Now, that is mechanically operated, is it not, Mr. Tierney? A. Yes, sir.

Q. How is it removed from the train?

A. How is it removed from the train?

(Testimony of George Edward Tierney.)

Q. The train ticker, yes.

A. It is under lock and key. The roundhouse force removes it.

Q. That is at the end of the trip?

A. I don't know whether they let them run out or remove them every trip or not. I think every trip on these long trips.

Mr. McCaffery, Jr.: That is all, Mr. Tierney.

Mr. Pauly: That is all, Mr. Tierney.

(Witness excused.)

ROY P. JORGENSEN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pauly:

Q. State your name, please.

A. Roy P. Jorgensen. [278]

Q. Where do you live? A. Missoula.

Q. Are you employed by the Milwaukee Railroad? A. Yes, sir.

Q. In what capacity? A. Claim agent.

Q. Where is your headquarters in that respect?

A. At Missoula.

Q. As claim agent, did you assist in assembling witnesses and evidence that might be used in connection with the trial of this case? A. Yes, sir.

Q. Did you, at our request, endeavor to obtain

(Testimony of Roy P. Jorgensen.)

this speed tape for the locomotive used in pulling Train 16 out of Seattle on August 16, 1947?

A. Yes, sir.

Q. What action did you take in endeavoring to obtain that tape?

A. I wired to the general superintendent of motive power at Milwaukee, Wisconsin, who is custodian of those tapes, as I understand it.

Q. Can you tell us what wire you may have sent?

A. I wired Mr. A. G. Hoppe, Milwaukee, "Can you send me at Butte speed tape, Diesel Engine No. 6 on Train 16, leaving Seattle August 26, 1947, marked to show Seattle, Renton, Maple [279] Valley, Cedar Falls and Cle Elum, for use at trial, Federal Court at Butte, commencing Wednesday, October 19th. Advise me at Butte. A 174 R. P. Jorgensen, District Adjuster."

Q. Did you receive a reply to that telegram?

A. I did.

Q. Did I ask you when you sent that telegram?

A. On October 17, 1949, from Missoula.

Q. Did you receive a reply to that telegram?

A. Yes, sir.

Q. I show you a slip of paper marked "Defendant's Exhibit No. 4, and ask you if that is the reply that you received to the telegram you sent?

A. It is.

Court: Are you now offering Defendant's Exhibit 4?

Mr. Pauly: Yes, your Honor.

(Testimony of Roy P. Jorgensen.)

Court: Any objections, Mr. McCaffery?

Mr. McCaffery, Jr.: To which the plaintiff objects on the grounds and for the reasons that it is a self-serving declaration, the custom adopted by the railroad is again in evidence. The reply would not bind the plaintiff or any person, party to the action. They were aware of a possible claim. That is all.

Court: The objection is overruled.

Mr. Pauly: It is received in evidence?

Court: It is received in evidence. [280]

DEFENDANT'S EXHIBIT 4

“GS19CG Z

MILW WIS 10 18 49 1225 PM

R P Jorgensen

Butte

A-174 We Hold Speed Tapes for One Year Tape
You Have Requested Has Been Destroyed H-6

A G H.

Filed Oct. 25-1949.

H. H. WALKER,
Clerk.

By D. F. HOLLAND,
Deputy.

(Testimony of Roy P. Jorgensen.)

Mr. Pauly: May I read it to the jury now?

(Mr. Pauly reads Exhibit 4, as above set out, to the jury.)

Q. Mr. Jorgensen, can you explain to me what some of those numbers on there might mean?

A. These numbers up at the top, I can't explain. That is some symbol used by the telegraph operator at Milwaukee to the operator at Butte. That is just a guess on my part.

Q. "Milwaukee, Wisconsin, 10 18 49", what is that?

A. It means the message was filed in Milwaukee, Wisconsin, October 18, 1949.

Q. And "1225 P.M."?

A. It means 12:25 P.M. that afternoon.

Q. The message starts with the number "A-174". What does that mean?

A. That is a symbol we used on the railroad to simplify our telegraph service. On the wire I sent to Mr. Hoppe, I put a symbol A-174 on it. [281]

Court: Counsel, I don't think there is any necessity of going into this.

Mr. Pauly: I simply wanted to explain these hieroglyphics to the jury. That is all, as far as we are concerned, with the witness.

Cross-Examination

By Mr. McCaffery, Jr.:

Q. Mr. Jorgensen, when did you first know that the plaintiff, Mary Ann Harrington, had a claim in this case?

(Testimony of Roy P. Jorgensen.)

Mr. Garlington: Just a minute; objected to as improper cross-examination.

Court: Overruled.

A. I would say June 1, 1948.

Q. June 1, 1948, that would still have been within the year, wouldn't it, Mr. Jorgensen?

A. That's right.

Mr. McCaffery, Jr.: That is all.

(Witness excused.)

Court: Call the next witness.

Mr. Pauly: At this time, your Honor, we would like to offer in evidence depositions of certain witnesses that are contained in the Clerk's file. In that connection, I should like to request that the Court inform the jury as to, in general, [282] the use of such depositions on written interrogatories so that they will know something about how it happens they are presented in that form.

Court: Well, the Court is not concerned with any depositions until you lay the foundation for the offer of the depositions.

Mr. Pauly: It is by stipulation, your Honor. May the record show that the deposition of Mrs. Ruth Burroughs and the deposition of Wendy Burroughs, both of which have been marked "filed October 21, 1949," were at this time removed by the clerk from an envelope, which in turn was marked "filed October 17, 1949?"

Court: Well, what does the stipulation with

reference to the depositions provide, just that they may be used?

Mr. Pauly: They are all substantially the same form, your Honor.

Court: The deposition may be used and offered in evidence at the trial of said cause by either of said parties thereto and applied in conformity with the Rules——(interrupted)

Mr. Pauly: The stipulation says pursuant to Rule 29 of the Federal Rules of Civil Procedure.

Court: What does Rule 29 provide?

Mr. Garlington: I have it here.

Court: It provides that if the parties so stipulate in writing, depositions may be taken before any person at any time [283] or place, upon any notice, and in any manner, and when so taken may be used like other depositions. The Court is still bound by the rules that you have to lay a proper foundation for the use of a deposition. The Rules of Procedure set up the method by which we try cases, and I don't think counsel can stipulate.

Mr. Pauly: Do you mean by that, your Honor, to prove the absence of the witnesses from the jurisdiction of this Court?

Court: Whatever basis you feel you have for the use of the depositions.

Mr. Pauly: I believe counsel for the plaintiff will stipulate each of the witnesses involved are outside of the State of Montana, District of Montana.

Mr. McCaffery, Jr.: That is correct.

Mr. Pauly: It is for that reason their deposi-

tions are offered, and they did not wish to attend in person, and we have no means for them to attend in person.

Court: Was a subpoena issued for them?

Mr. Pauly: No, your Honor, they are not in this jurisdiction.

Court: Does counsel make any objection to the use of the depositions?

Mr. McCaffery, Jr.: No, if the Court please.

Court: Very well, you may proceed upon that basis.

Mr. Pauly: I take it the Court does not care to make any further statement to the jury regarding use of the depositions [284] in the absence of the witnessess themselves.

Court: Yes. Ladies and gentlemen of the jury, the Rules of Procedure in the Federal Court provide that under certain circumstances, the testimony of witnesses may be taken upon oral interrogatories at a place some place out of Court, both sides being represented at the time of the oral interrogatories. That was so in this instance?

Mr. McCaffery, Jr.: It was not, if the Court please.

Court: The oral interrogatories were submitted before an officer authorized to swear the witness—in other words, the witness was sworn and answered certain questions that counsel had agreed should be submitted to the witness. In answer to those questions, the witness made answer. The answer is then transcribed and forwarded to the Court, just

as you saw here, in sealed envelopes, and is opened here. Now, counsel have agreed here that the deposition may be used and considered by you as evidence just as if the testimony that is contained in the deposition was given here orally in court. Is that what you had in mind, Mr. Pauly?

Mr. Pauly: Yes, your Honor, and that the witness, in answering questions, is put upon oath.

Court: Yes. You understand the witness is put on oath just as if the witness were here present in court.

Mr. Pauly: May I have someone act as the witness? I suggest Mr. Garlington, who might read the answers as I read the [285] questions.

Mr. McCaffery, Jr.: I want to have both of them sworn.

Court: In reading the answers, give Mr. McCaffery an opportunity to make whatever objections he may have.

Mr. Garlington: Certainly.

Mr. Pauly: Does the Court deem it proper to read the stipulation?

Court: That may be dispensed with.

(Whereupon, the Deposition of Mrs. H. A. Burroughs was read to the jury as follows, Mr. Pauly reading the questions and Mr. Garlington reading the answers.)

Mr. Pauly: I have here the deposition of Mrs. Ruth Burroughs, of Evanston, Illinois. (Reading.)

DEPOSITION OF MRS. RUTH BURROUGHS

Direct Interrogatories

Q. State your name, address and family status.

A. Mrs. H. A. Burroughs, 1914 Sheridan Road, Evanston, Illinois. Housewife, married to Mr. H. A. Burroughs.

Q. On August 26, 1947, were you a passenger on Milwaukee Train No. 16 when it departed from Seattle? A. Yes.

Q. State where you got on the train, your destination, what space you occupied, and with whom you were traveling.

A. Seattle. Destination Chicago. I occupied the section directly across from Mrs. Harrington. I don't remember the section number. I was traveling with my two daughters, Wendy [286] and Connie, aged 5 and eight.

Q. Do you recall an elderly lady being in the same car and suffering a fall? A. Yes.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was traveling, and what space on the car they occupied.

A. I believe she got on at Seattle. She was traveling with her daughter. She occupied the section directly across from myself and my two daughters.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

(Deposition of Mrs. Ruth Burroughs.)

A. She sat there in her seat, and she remained there for some time, she didn't move. She appeared to be very feeble. She just sat there. She didn't do anything particularly.

Q. Describe the activities, if any, of Mrs. Harrington's companion during this period.

A. Mrs. Harrington's companion was very concerned about her mother throughout the whole time before the fall. She left her seat many times. She was not with her mother very much. She would go off for a time and then she would return and she would inquire as to her mother's condition, how she felt, and repeatedly cautioned her mother not to move from her seat, and she would go off again in the club car. My daughters and I were [287] having a coke and observed her in the club car. She was not sitting with her mother very much.

Q. Describe the activities, if any, of yourself and your children during this period.

A. I was sitting on the west side, going forward, facing forward, and I was reading, and my daughters were sitting opposite me playing games and observing the passengers on the train and looking out the window, and possibly they went down the aisle for a drink of water.

Q. Describe in as much detail as possible what you observed of Mrs. Harrington's fall.

A. Mrs. Harrington stood up, despite the fact that her daughter had cautioned her repeatedly not to. I saw her stand up and try to hang her hat

(Deposition of Mrs. Ruth Burroughs.)

up there, and the hook was quite high up and she sort of braced her knee on the seat and then she toppled over and landed in the aisle.

Q. Describe what action, if any, you took after her fall.

A. I stopped reading, and almost immediately a man passenger on the car and the porter arrived, and then the conductor came there very soon. The conductor asked if there was anyone with this woman. And I told him that she was traveling with her daughter. As he didn't know who the daughter was, I suggested that I would go and find her. I found her in the observation car, and I told her that her mother had fallen. Then she went back to our car and then I went back to my seat. [288]

Q. Describe what was done after the fall, for Mrs. Harrington and by whom?

A. The porter asked her if she was hurt, and she said, "No", that she was all right. The conductor also asked her whether she was hurt and she said "No", she was all right. They were very kind to her and assisted her. And they tried to make her comfortable in her seat. She said she was all right, so there wasn't very much to do for her, except to see that she was comfortable.

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. It was moving all the time.

Q. State how long after the train had left Seattle that the fall occurred.

(Deposition of Mrs. Ruth Burroughs.)

A. I am not sure, but I think it was around three hours after its departure from Seattle.

Q. Describe the motion, if any, of the train just prior to and at the time of Mrs. Harrington's fall.

A. It was a very normal motion, no unusual jerks of any kind. Just a very normal motion.

Q. Where were your children during the period covered by your answers to the foregoing questions, and what were they doing?

A. Well, they were in our section, they were riding backwards in our section, which was directly across from Mrs. Harrington's section, and they were playing games, looking out the windows and observing the passengers in the car.

Mr. Pauly: The remainder of the deposition consists of cross interrogatories asked by counsel for the plaintiff, Mr. McCaffery, would you care to read your cross interrogatories, or should I?

Mr. McCaffery, Jr.: Go ahead, Harry, you are doing fine.

Mr. Pauly: The jury will understand these questions are submitted by counsel for the plaintiff.

Cross Interrogatories

Q. Did you previously make a statement to a claim agent or investigator for the railroad company? A. Yes, I did.

Q. If your answer to the previous question is yes, state when and to whom.

(Deposition of Mrs. Ruth Burroughs.)

A. The first day of December, 1947, to a Mr. Zicherick.

Mr. Garlington: Your Honor, may I suggest there is no need for the reporter to take the depositions. He may copy them.

Court: Yes, I think he should take them.

Q. Did one of the servants of the railroad company take your name at the time of the accident?

A. Yes, the conductor did.

Q. Were you riding in the same car with the person who has been identified as Mrs. Mary Harrington? A. Yes. [290]

Q. Where were you seated when Mrs. Mary Harrington first came into Car A-16? (You may assume that this is the correct car number in which Mrs. Harrington was riding.)

A. I don't recall.

Q. Were you and your children occupying Section 12 of this car at the time Mrs. Mary Harrington and her daughter boarded the train?

A. I don't recall the section number, but I was in the section directly opposite Mrs. Harrington.

Q. If your answer to the previous question is yes, what reservations did you have in Car A-16?

A. We originally had a reservation for a section on that train, but when we arrived on the train it was occupied by a man and lady, and we were given this section until the following morning at six o'clock.

(Deposition of Mrs. Ruth Burroughs.)

Q. What was your husband's occupation on the 26th day of August, 1947?

A. He was assistant vice-president of the Automatic Electric Company of Chicago.

Q. Do you recall whether the floors between the seats in your car were covered with a rug material or linoleum material?

A. It was a linoleum material.

Q. Did you, at any time, observe the porter or conductor assisting Mrs. Mary Harrington before her fall?

A. I don't recall. [291]

Q. Did Mrs. Mary Harrington, in your presence, and after she had fallen, give any explanation or state any reason for her fall? If Mrs. Harrington made a statement, what was it?

A. She made no statement as to why she fell.

Q. If Mrs. Harrington made some statement, can you recall the persons present when the statement was made?

A. She told the porter and the conductor that she was all right, that she wasn't hurt.

Q. Were you seated directly across the aisle from Mrs. Mary Harrington? And if so, were you occupying the east or west seat as the train left Seattle?

A. Yes. I was occupying the west side, riding forward, in a forward position.

Mr. Pauly: That is the end of the deposition of Mrs. Ruth Burroughs. We will now read the Deposition of Wendy Burroughs, Evanston, Illinois:

DEPOSITION OF WENDY BURROUGHS

Direct Interrogatories

Q. State your name, address, age, grade in school, where you live and with whom.

A. Wendy Burroughs. 1914 Sheridan Road, Evanston, Illinois. Eleven years old. I live with my mother and father and sister.

Q. On August 26, 1947, were you a passenger on Milwaukee Train No. 16 when it departed from Seattle? A. Yes.

Q. State where you got on the train, your destination, what [292] space you occupied, and with whom you were traveling.

A. In Seattle to come to Chicago. I don't know the number of the section, but I was in the section directly opposite where Mrs. Harrington fell, in the section with my mother and sister.

Q. Do you recall an elderly lady being on the same car and suffering a fall? A. Yes.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was traveling, and what space on the car they occupied.

A. I don't know where she got on. I guess she was traveling with her daughter. She occupied the space that was directly opposite the space we were occupying.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

(Deposition of Wendy Burroughs.)

A. She was just sitting there, she was reading a book, I guess.

Q. Describe the activities, if any, of Mrs. Harrington's companion during this period.

A. Well, she was just running back and forth, she would come into the car and see how her mother was and then she would leave again.

Q. Describe what you were doing during this period.

A. Oh, I was just playing games there with my sister, looking [293] out the window. I was just sitting in the seat with my sister playing games.

Q. Describe in as much detail as possible what you observed of Mrs. Harrington's fall.

A. Well, she got up and she reached up with her hands to put her hat up there and then she fell and she landed in the main aisle. I think she put her knee on the seat when she reached up.

Q. Describe what action, if any, you took after her fall. A. I wasn't allowed to leave my seat.

Q. Describe what was done after the fall for Mrs. Harrington, and by whom.

A. Well, I don't know, but I saw the porter put her on the seat, and I know there was another man there. I think he had been sitting back of us, but I don't know. I don't know if this man touched her. Later on the conductor came in. I guess the porter went and got the conductor, but I don't know that for sure.

(Deposition of Wendy Burroughs.)

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. It was moving.

Q. State how long after the train had left Seattle that the fall occurred.

A. I don't know, but I know it was before dinner.

Q. Describe the motion, if any, of the train just prior to [294] and at the time of Mrs. Harrington's fall.

A. It didn't jerk or anything, it traveled along smoothly.

Mr. Pauly: The following questions, now, are cross interrogatories submitted by counsel for the plaintiff:

Cross Interrogatories

Q. Did you see Mrs. Mary Harrington fall?

A. Yes.

Q. What was she doing, or about to do, when she fell?

A. Trying to hang her hat up.

Q. Did the train jerk about the time Mrs. Harrington fell?

A. No.

Q. Did you talk to anybody about Mrs. Harrington's fall before?

A. Yes.

Q. Did the person to whom you talked represent the railroad company, if you know?

A. I think so.

Q. Did you and your mother occupy the seat of Mrs. Harrington and her daughter when Mrs. Harrington first got on the train?

A. No.

(Deposition of Wendy Burroughs.)

Q. Did you have to move across the aisle to your seat? A. No.

Q. Who helped you move?

A. We didn't move across the aisle.

Q. Had the train left Seattle when you moved?

A. No, sir. [295]

Mr. Pauly: That is all of that deposition. The following is a Deposition of Mrs. A. J. Stratton:

DEPOSITION OF MRS. A. J. STRATTON

Direct Interrogatories

Q. State your name, address and family status.

A. Mrs. A. J. Stratton, Stony Creek Mills, Pennsylvania, housewife.

Q. On August 26, 1947, were you a passenger on Milwaukee train No. 16 when it departed from Seattle? A. Yes.

Q. State where you got on the train, your destination, what space you occupied, and with whom you were traveling.

A. We got on at Seattle. Our destination was Chicago; section 14. I was traveling with my husband, Mr. A. J. Stratton.

Q. Do you recall an elderly lady being in the same car and suffering a fall? A. Yes.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was travelling, and what space on the car they occupied.

(Deposition of Mrs. A. J. Stratton.)

A. I do not recall where she got on. She was traveling with a younger woman. They occupied the space immediately to the rear, and on the same side of the car.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

A. I did not observe her except to notice that she was there. [296]

Q. Describe the activities, if any, of Mrs. Harrington's companion during this period.

A. I was aware of the companion leaving the section several times and being absent much of the time.

Q. Describe what you were doing during this period.

A. I was sitting facing the rear of the coach and occasionally looking out the window.

Q. Describe in as much detail as possible what you observed of Mrs. Harrington's fall.

A. I was seated on the aisle side of the seat and saw Mrs. Harrington in the act of falling. She was in the center aisle of the car facing toward me and extended her hands out to break her fall and landed in a kneeling position with her left hand on the arm-rest of the seat immediately in back of Mr. Stratton and her right hand, as I recall, on the arm-rest on the seat across the aisle from where her left hand was. I do not recall on which knee she landed.

(Deposition of Mrs. A. J. Stratton.)

She cried out, "Oh! Oh!" She remained in a kneeling position.

Q. Describe what action, if any, you took after her fall.

A. I went to her assistance, but she would not allow me to help her.

Q. Describe what was done after the fall for Mrs. Harrington, and by whom.

A. Other passengers and the porter and conductor went to her assistance. Someone went for her daughter. [297]

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. The train was moving.

Q. State how long after the train had left Seattle that the fall occurred.

A. I am not positive as to the time.

Q. Describe the motion, if any, of the train just prior to and at the time of Mrs. Harrington's fall.

A. It seemed to me it was smooth at the time. It didn't have any humps and bumps.

Mr. Pauly: The following are cross interrogatories submitted by plaintiff's counsel:

Cross Interrogatories

Q. What Section did you have in Car A-16?

A. Section 14.

Q. Did you see Mrs. Mary Harrington fall?

A. Yes.

Q. From what place in the car was your observation made of her fall?

(Deposition of Mrs. A. J. Stratton.)

A. From my seat on the aisle in Section 14.

Q. Did you assist Mrs. Harrington after her fall?
A. I tried to.

Q. Were you present when Mrs. Harrington made any statement as to the cause of her fall?

A. No.

Q. If your answer to the previous question is yes, what was [298] the statement she made, and give the identity of the persons present to the best of your ability.
A. No answer.

Q. Can you describe the floor-covering between the seats?
A. No, I can't.

Q. Was it of rug or linoleum composition?

A. I don't remember.

Q. Have you previously made a statement to one of the railroad's representatives?

A. I did.

Q. If your answer to the previous question is yes, to whom was it made and when?

A. To Mr. Ring on July 20, 1949.

Q. Did Mrs. Harrington and her daughter have any difficulty in occupying the space in which she later fell? In other words, was the space occupied at the time Mrs. Harrington and her daughter boarded the train?

A. I don't know. I didn't hear anything.

Q. If your answer to the previous question is yes, when, with references to the train's departure from Seattle, did Mrs. Harrington first occupy the space in Section 12? (You may assume Section 12 is the Section in which Mrs. Harrington fell.)

(Deposition of Mrs. A. J. Stratton.)

A. I don't know when Mrs. Harrington first occupied the space in Section 12. [299]

Mr. Pauly: That is the end of Mrs. Stratton's deposition.

DEPOSITION OF A. J. STRATTON

Direct Interrogatories

Q. State your name, address and occupation.

A. A. J. Stratton, Stony Creek Mills, Pennsylvania, President, Reading Street Railway Company.

Q. On August 26, 1947, were you a passenger on Milwaukee train No. 16 when it departed from Seattle? A. Yes.

Q. State where you got on the train, your destination, what space you occupied, and with whom you were traveling.

A. Boarded the train at Seattle, destination Chicago, accompanied by Mrs. Stratton.

Q. Do you recall an elderly lady being in the same car and suffering a fall? A. Yes.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was traveling, and what space on the car they occupied.

A. I did not notice Mrs. Harrington as to the point at which she boarded the train except having casually observed her as a passenger, occupying the space immediately behind the space occupied by Mrs. Stratton and myself. She was accompanied

(Deposition of A. J. Stratton.)

by a younger person said to have been her daughter. The space occupied by Mrs. Stratton and myself was section 14 at the [300] forward end of the car. I sat facing forward and Mrs. Stratton sat facing me. This was the left side of the train as referred to the direction in which the train was moving.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

A. I paid no particular attention to the lady or her activities.

Q. Describe the activities, if any, of Mrs. Harrington's companion during this period.

A. Mrs. Harrington's companion did not seem to be very much in evidence.

Q. Describe what you were doing during this period.

A. Looking out of the window and generally enjoying the scenery.

Q. Describe in as much detail as possible what you observed of Mrs. Harrington's fall.

A. I did not observe Mrs. Harrington fall.

Q. Describe what action, if any, you took after her fall.

A. Inasmuch as several ladies went to Mrs. Harrington's assistance, I personally did not take any part in the matter.

Q. Describe what was done after the fall for Mrs. Harrington, and by whom.

A. Lady passengers assisted Mrs. Harrington

(Deposition of A. J. Stratton.)

to regain her seat. The porter was summoned and eventually the pullman and train conductors. Also, I believe someone summoned Mrs. [301] Harrington's daughter from another part of the train.

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. The train was moving at a normal and probably scheduled rate of speed. In my judgment the speed was not excessive.

Q. State how long after the train had left Seattle that the fall occurred.

A. I cannot be very definite about the question. My recollection is about two hours.

Q. Describe the motion, if any, of the train just prior to and at the time of Mrs. Harrington's fall.

A. The car in which we were riding was relatively new, and in my judgment swaying and other conditions contributing to passenger discomfort had been largely eliminated. I think the train ride was exceptionally smooth considering the terrain over which it traveled. There was no undue lurching of the car, that I recall, prior to her fall.

Mr. Pauly: That is the end of the direct questions.

Cross Interrogatories

Q. What Section did you have in Car A-16?

A. Section 14.

Q. Did you see Mrs. Mary Harrington fall?

A. No.

(Deposition of A. J. Stratton.)

Q. From what place in the car was your observation of her fall made? [302]

A. I did not see her fall.

Q. Did you assist Mrs. Harrington after her fall? A. No.

Q. Were you present when Mrs. Harrington made any statement as to the cause of her fall?

A. No.

Q. If your answer to the previous question is yes, what was the statement she made, and give the identity of the persons present to the best of your ability. A. No answer.

Q. Can you describe the floor-covering between the seats? A. No.

Q. Was it of rug or linoleum composition?

A. I do not know.

Q. Have you previously made a statement to one of the railroad's representatives? A. No.

Q. If your answer to the previous question is yes, to whom was it made and when?

A. No answer.

Q. Did Mrs. Harrington and her daughter have any difficulty in occupying the space in which she later fell? In other words, was the space occupied at the time Mrs. Harrington and her daughter boarded the train?

A. To the best of my knowledge there was no difficulty concerning [303] her space.

Q. If your answer to the previous question is yes, when, with references to the Train's departure

(Deposition of A. J. Stratton.)

from Seattle, did Mrs. Harrington first occupy the space in Section 12? (You may assume Section 12 is the Section in which Mrs. Harrington fell.)

A. I do not remember when.

Mr. Pauly: That is all of Mr. Stratton's deposition.

Court: We will interrupt at this point, I have another matter to consider for a moment.

(15-minutes recess.)

Mr. Pauly: The next deposition to be read is that of Mr. J. B. Abney of Albertville, Alabama:

DEPOSITION OF MR. J. B. ABNEY

Direct Interrogatories

Q. State your name, address and occupation.

A. J. B. Abney, my address is South. Broad Street, Albertville, Alabama; my occupation, Truck Driver for Commercial Carriers.

Q. On August 26, 1947, were you a passenger on Milwaukee Train No. 16 when it departed from Seattle? A. Yes.

Q. State where you got on the train, your destination, what space you occupied, and with whom you were traveling.

A. I got on the train in Seattle, Washington. I was going to Albertville, Alabama by way of Chicago, Illinois. I was sitting next to the aisle, facing in direction which train was [304] going on left hand side of aisle at rear of car. I was travelling with my wife.

(Deposition of J. B. Abney.)

Q. Do you recall an elderly lady being in the same car and suffering a fall? A. Yes, I do.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was traveling, and what space on the car they occupied.

A. She got on train in Seattle, with a woman whom I believe to be her daughter; they sat on same side of train as we did at the opposite end of the car. Mrs. Harrington was seated facing me.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

A. I first saw her when she got on the train as she walked down the aisle to her seat. I didn't particularly pay any attention to her until later.

Q. Describe the activities, if any, of Mrs. Harrington's companion during this period.

A. Mrs. Harrington's companion talked to several of the passengers on the train, then she left the car long periods of time. She returned after Mrs. Harrington fell.

Q. Describe what you were doing during this period.

A. I remained in my seat, watching the scenery and activities [305] of passengers on the train.

Q. Describe in as much detail as possible what you observed of Mrs. Harrington's fall.

A. She was upon her seat on her knees, with her

(Deposition of J. B. Abney.)

back toward me. She was reaching up to hang something on the hook above her. I said to my wife at that time,—

Mr. McCaffery, Jr.: Just a minute. We will object to any statement which this witness made to his wife on the grounds and for the reason it is hearsay, it is hearsay as far as this plaintiff is concerned; incompetent, irrevelant and immaterial.

Mr. Garlington: Have you seen the answer?

Court: Look at the answer. The objection will be sustained. Technically, what he said to his wife is hearsay as to this plaintiff, so do not read that part of the deposition stating what he said to his wife.

A. (Continued): She was holding to the back of her seat with her left hand. I looked away for an instant and when I looked again she was making an effort to sit down. While she was still in a kneeling position on the seat, she turned slightly to her right to sit down on her seat, then she fell towards me against the seat in front of her seat, the seat in which she had been sitting. By that I mean she was kneeling on the seat when she fell facing somewhat towards the aisle and fell back onto the seat opposite from where she had been seated. [306] After falling against this seat, she fell into the aisle. When she fell, there was a hat on the hook to which she had been reaching towards and at the time she fell she had already released her hold on the back of the seat. She had knelt on the seat next to the arm rest on the aisle side of the seat.

(Deposition of J. B. Abney.)

Q. Describe what action, if any, you took after her fall.

A. Others went to her assistance, so I remained in my seat.

Q. Describe what was done after the fall for Mrs. Harrington, and by whom.

A. Passengers went to her assistance. The porter and conductor were called, and they first put her back on her seat, then they made up her berth and put her to bed. Someone went back and got her daughter from another car. A Doctor got on the train at Spokane and attended her.

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. The train was moving.

Q. State how long after the train had left Seattle that the fall occurred.

A. I don't recall.

Q. Describe the motion, if any, of the train just prior to and at the time of Mrs. Harrington's fall.

A. The train was travelling at a very smoothly rate. There were no jerks, at any time, for when she fell she fell straight back, rather than to the right or left. [307]

Mr. Pauly: That is the end of the direct interrogatories.

Cross-Interrogatories:

Q. What section did you have in Car A-16?

A. I don't remember.

Q. Did you see Mrs. Mary Harrington fall?

(Deposition of J. B. Abney.)

A. I did see her fall.

Q. From what place in the car was your observation made of her fall?

A. From my seat facing toward her at the rear of the car where I was seated next to the aisle.

Q. Did you assist Mrs. Harrington after her fall? A. No.

Q. Were you present when Mrs. Harrington made any statement as to the cause of her fall?

A. No.

Q. If your answer to the previous question is yes, what was the statement she made, and give the identity of the persons present to the best of your ability.

A. I did not hear her make any statement.

Q. Can you describe the floor-covering between the seats? A. No.

Q. Was it of rug or linoleum composition?

A. I don't recall.

Q. Have you previously made a statement to one of the railroad's representatives? [308]

A. Yes.

Q. If your answer to the previous question is yes, to whom was it made and when?

A. I talked to some man from Chattanooga, Tennessee, who said he represented some railroad, but I do not recall his name.

Q. Did Mrs. Harrington and her daughter have any difficulty in occupying the space in which she later fell? In other words, was the space occupied

(Deposition of J. B. Abney.)

at the time Mrs. Harrington and her daughter boarded the train?

A. I did not notice any difficulty. I do not know whether or not the space was occupied.

Q. If your answer to the previous question is yes, when, with reference to the train's departure from Seattle, did Mrs. Harrington first occupy the space in Section 12? (You may assume Section 12 is the Section in which Mrs. Harrington fell.)

A. She sat down before the train left Seattle.

Mr. Pauly: That is the end of Mr. Abney's deposition. The following is a deposition of Mrs. J. B. Abney:

DEPOSITION OF MRS. J. B. ABNEY

Direct Interrogatories

Q. State your name, address and family status.

A. My name is Alice Abney, my address is South Broad Street, Albertville, I am married to Mr. J. B. Abney.

Q. On August 26, 1947, were you a passenger on Milwaukee train No. 16 when it departed from Seattle? A. Yes. [309]

Q. State where you got on the train, your destination, what space you occupied, and with whom you were traveling?

A. I got on the train in Seattle, I was going to Albertville, Alabama, by way of Chicago, Ill. I was traveling with my husband. I was at the rear end of the car next to the window on the left

(Deposition of Mrs. J. B. Abney.)

hand side of the car, in same seat with husband.

Q. Do you recall an elderly lady being in the same car and suffering a fall? A. Yes.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was traveling, and what space on the car they occupied.

A. She first got on train in Seattle, she was traveling with a person whom I believed to be her daughter. They were ahead of us at the opposite end of the car on the left side, the same as us.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

A. I just noticed her walking to her seat at the time she got on at Seattle and didn't pay much attention to her until Mr. Abney, my husband, called my attention to her.

Q. Describe what you were doing during this period. A. Looking at the scenery.

Q. Describe in as much detail as possible what you observed of [310] Mrs. Harrington's fall.

A. My husband called my attention to her and I leaned to my right to watch her and saw her kneeling on the seat near aisle with her back toward me reaching up with one of her hands and with the other was trying to hold wall in front of her. I then looked away and did not see her fall.

Q. Describe what action, if any, you took after her fall.

(Deposition of Mrs. J. B. Abney.)

A. I did nothing at all, but remained in my seat. Others were looking after her.

Q. Describe what was done after the fall for Mrs. Harrington, and by whom.

A. Others looked after her, I do not recall who they were.

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. The train was moving.

Q. State how long after the train had left Seattle that the fall occurred.

A. I don't recall.

Q. Describe the motion, if any, of the train just prior to and at the time of Mrs. Harrington's fall.

A. The train was moving along normally, nothing out of the way occurred, there were no jerks. It was a smooth ride.

Mr. Pauly: The following are cross-interrogatories by counsel for the plaintiff:

Cross-Interrogatories

Q. What Section did you have in Car A-16?

A. I don't remember.

Q. Did you see Mrs. Mary Harrington fall?

A. I did not.

Q. From what place in the car was your observation made of her fall?

A. I didn't see her fall, but I did see her when my husband called my attention to her and I leaned over to the right.

(Deposition of Mrs. J. B. Abney.)

Q. Did you assist Mrs. Harrington after her fall? A. No.

Q. Were you present when Mrs. Harrington made any statement as to the cause of her fall?

A. No.

Q. If your answer to the previous question is yes, what was the statement she made, and give the identity of the persons present to the best of your ability.

A. I did not hear her make a statement.

Q. Can you describe the floor covering between the seats? A. No.

Q. Was it of rug or linoleum composition?

A. I don't recall.

Q. Have you previously made a statement to one of the railroad's representatives?

A. I talked to some man from Chattanooga, Tennessee.

Q. If your answer to the previous question is yes, to whom was it made and when? [312]

A. I do not know who he was, that is he told us his name but I don't remember it.

Q. Did Mrs. Harrington and her daughter have any difficulty in occupying the space in which she later fell? In other words, was the space occupied at the time Mrs. Harrington and her daughter boarded the train?

A. I didn't notice any difficulty.

Q. If your answer to the previous question is yes, when, with reference to the train's departure

(Deposition of Mrs. J. B. Abney.)

from Seattle, did Mrs. Harrington first occupy the space in Section 12? You may assume Section 12 is the section in which Mrs. Harrington fell.

A. I suppose she was seated before the train left Seattle.

Mr. Pauly: That is the end of Mrs. Abney's deposition. I should merely like to say, your Honor, that in addition to the witnesses that have been called, it was our intention to call Dr. Shields, who, at our request, made a physical examination of the plaintiff on August 20th of this year. In that connection, however, on arrival here in Butte for the purpose of attending this trial, we learned that Dr. Shields had already left the city to attend a conference of American Surgeons in Chicago. He is now absent, not expected to return until next week. I do not intend to ask for any continuance for the sake of permitting him to attend and testify. We did make it known to Dr. Shields that the setting was expected about this time; however, we did not advise him of the definite date. To that extent we are probably remiss. I wish to make that explanation to explain his absence at this trial. With that explanation, the defendant rests.

The Court: Do you have any rebuttal?

Mr. McCaffery, Jr.: There is no rebuttal, if the Court please.

The Court: Well, if counsel will approach the bench here, we may have a conference as to what further proceedings we are going to take at this time.

(Whereupon, the jury was admonished and excused from further attendance upon the court until 10:00 o'clock a.m., Monday, October 24, 1949, and the following proceedings were had in the absence of the jury:)

The Court: There are no jurors left in the courtroom, are there? Very well, proceed.

Mr. Garlington: May an order be made dismissing witnesses who have already testified in the case?

The Court: Yes, all witnesses who have been subpoenaed here are now excused permanently.

Mr. Garlington: At the close of all the testimony in the case, the defendant now desires to move the Court for an order, pursuant to Rule 50, Subdivision B of the Rules of Procedure, directing a verdict in this case in favor of the defendant and against the plaintiff, the motion being made upon each of the following grounds: first, that the complaint, as amended, does not state facts sufficient to constitute [314] a claim for relief against the defendant; second, there is no evidence in the record that the defendant has violated any legal duty owed to the plaintiff in this case; third, that there is not sufficient in the record to establish any of the alleged acts of negligence charged against the defendant by the plaintiff in the complaint, as amended; fourth, that there is not sufficient evidence in the record that any act of negligence on the part of the defendant was the proximate cause of any injury sustained by the plaintiff; fifth, that

the evidence shows that the plaintiff in the case was guilty of contributory negligence as a matter of law; sixth, that there is not sufficient evidence in the record to support or sustain any verdict or judgment in this case in favor of the plaintiff and against the defendant. That is the motion which I desire to make.

The Court: Very well, the motion is denied.

Mr. McCaffery, Jr.: At this time, if the Court please, the plaintiff desires to move the Court to withdraw from the consideration of the jury the issue of contributory negligence as alleged by the defendant's pleading, as amended, on the grounds and for the reasons that, first, no substantial evidence has been introduced in support of the allegation of contributory negligence whereby any act of the plaintiff contributed to the proximate cause of her injuries; secondly, that the evidence adduced at the trial and upon the defendant's [315] case was wholly directed to an activity of the plaintiff within the section for which she had contracted and which she had a right to engage in; third, that to submit the issue of contributory negligence to the jury in the language adopted by the amendment would be prejudicial error for the reason that the amendment seeks by indirection to include the defense of assumption of risk, and, if permitted to stand as such, would be a defense which is not permitted in actions of this nature prosecuted by a passenger against a carrier; that the language to which this objection is directed in the amend-

ment is as follows: "that if said floor rendered the footing insecure for the plaintiff while standing thereon during travel, she knew and realized the same, or by the exercise of reasonable care, should have done so, and should not have incurred the risk, if there was a risk, of standing and moving about on such floor without assistance"; fourth, that the defense, as asserted, places upon the plaintiff a duty of care not required by law to be exercised by a plaintiff in a case against a carrier wherein the law, by all authorities, is that she may assume that the highest degree of care has been exercised in providing her with safe transportation and appliances and other things, which have been dictated by the reasonable exercise of skill on the part of the railroad company for her safe passage; that until such assumption has been dissipated by the showing of a patent defect, no care need be exercised [316] by the passenger in a section with her travel.

The Court: What is the law of the State of Washington with reference to contributory negligence? Does contributory negligence assume negligence by the defendant?

Mr. Myers: It is my understanding, your Honor, that a plea of contributory negligence in Washington may be made without admitting negligence on the part of the defendant, and that the question——(interrupted)

The Court: It may be made without admitting it, yes, but in the final analysis, and in submit-

ting it to a jury, what is the position the Court is in then? Don't you have to instruct the jury that contributory negligence is based upon negligence in the first place by the defendant?

Mr. Myers: Such negligence as, cooperating with the negligence of the defendant, produces the injury.

The Court: I think that the pleading of contributory negligence here is sufficient, particularly under the Federal Rules, and it need not be submitted—if contributory negligence is set up, the mere fact that it is set forth in words which do not conform to the law—that is the question—wouldn't make it insufficient so far as submitting the question to the jury. In other words, if contributory negligence is proved and there is some evidence of it, it can be submitted to the jury, not in the characteristics made by the pleading, but under the instructions of the Court. However, I am going to reserve my ruling on your motion at this time, and we will discuss the matter in connection with our settling and conference on the instructions generally. Court will stand in recess at this time until ten o'clock tomorrow morning, or, rather, Monday morning.

(Whereupon, court was adjourned until 10:00 o'clock a.m., October 24, 1949, at which time the following proceedings were had, the jury and counsel for both parties being present:)

(Mr. Myers made the opening argument to the jury on behalf of the plaintiff; Mr. Pauly

argued the case to the jury on behalf of the defendant; and Mr. McCaffery, Jr., closed the argument to the jury on behalf of plaintiff.)

(Whereupon, a recess was taken until 2:00 o'clock p.m., same day, at which time the following proceedings were had:)

The Court: In the case of *Harrington vs. Chicago, Milwaukee, St. Paul Railroad*, for the record, it may show that the Court is giving all of the instructions requested by the defendant here, either as submitted or as amended and counsel advised of the amendments, except Instruction D-4, which was withdrawn, D-7, which was withdrawn, D-12, which is included within the instructions the Court will give, D-14, which is included within the instruction the Court will give; and the Court refuses to give Defendant's Instruction No. D-16.

As to the plaintiff's instructions, the Court has given and will give all of the instructions submitted, either just as [318] submitted, or as amended by the Court and counsel advised, with the exception of Instruction No. 1, which is included within the instructions of the Court, Instruction No. 2, which is included, Instruction No. 3, which is included, and No. 4, which is included within the instructions to be given by the Court, Instruction No. 9, withdrawn, Instruction 11, Plaintiff's Instruction 11 is included within the instructions of the Court, as is number 13. The Court refuses to give

Instruction No. 14, and Instruction No. 10 is included within the instructions of the Court.

Jury Charge

The Court: Well, now, ladies and gentlemen of the jury, we have come to that part of the proceedings which you have been advised of before where the Court instructs you as to the law of the case. You have heard the evidence and arguments of counsel, and it is now my duty to instruct you as to the law governing this case, and it is your duty as jurors to follow the law as stated in these instructions of the Court, and to apply that law to the facts as you find them from the evidence before you.

You are not to single out any one instruction alone as stating the law of this case, but must consider the instructions as a whole, and, regardless of any opinion that you may have as to what the law ought to be, it will be a violation of your duty, your sworn duty, to base a verdict upon any other view [319] of the law than that given to you by these instructions.

You have been chosen and sworn as jurors in this case to try issues as presented by the allegations of the complaint of the plaintiff and the answer of the defendant, and you are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion; and the parties and the public and the Court expect

that you will carefully and impartially consider all of the evidence and follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community. The corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons. In other words, all persons, including corporations, which are legal entities, stand equal before the law.

You are instructed that because this case is submitted to you for decision it is no indication or evidence that there is or is not liability upon the defendant, nor is it any indication that, in the opinion of the Court, there is or is not liability. It is for you to determine from the evidence and the law as given you by the instructions whether or not there is liability, and you must determine this question first, and if you find that the plaintiff has not established a case of liability by a preponderance of the evidence, you shall not consider [320] any other question in the case, but shall find for the defendant.

Plaintiff, in this case, claims damages for personal injuries alleged to have been suffered by her as a proximate result of claimed negligence on the part of the defendant. You are instructed that the plaintiff need not prove the allegations of the complaint which are admitted by the answer. Any

allegation of the complaint which is so admitted in the answer is to be taken by you and regarded as true.

You are instructed that every person who suffers detriment from the unlawful act or omission of another may recover from the person at fault a compensation therefor in money, which is called damages. Detriment is the loss or harm suffered in person, in this case.

Now, in considering the case, you are further instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue of whether the defendant was negligent in failing to notify the plaintiff through its public address system on the train that the train was about to start, and, therefore, that issue is withdrawn from your consideration.

Likewise, there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue of whether the defendant's employees were negligent and careless in failing to assist the plaintiff to make a change [321] to her permanent seat in the train, and, likewise, that issue is withdrawn from your consideration.

There is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue of whether defendant negligently furnished to the plaintiff inadequate and unsafe facilities for the accommodation of her hat and coat by reason of the size and location of the

hook in the section, as alleged in the complaint, and, therefore, that issue, likewise is withdrawn from your consideration.

There isn't sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue of duplicating the sale of plaintiff's seat space, by which the plaintiff was unable to locate herself permanently in her seat before changing her place in her section, and, therefore, that issue is likewise withdrawn from your consideration.

You are further instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant was negligent in having a hard surfaced composition floor material in its Touralux coaches, and, so, the issue of deciding whether the plaintiff could recover is withdrawn from your consideration based upon the mere furnishing of a hard-surfaced composition floor material; and, likewise, you are instructed that there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant negligently started the train with a violent and unusual jerk. Therefore, that issue is withdrawn from your consideration, so you will not consider those two elements separately in considering the case, but you will consider them together as you will be further instructed by the Court.

Now, in order to establish the essential elements

of her case, the burden is upon the plaintiff to prove by a preponderance of the evidence the following facts: First, that the defendant was negligent, as herein defined; and second, that the defendant's negligence was a proximate cause of any injuries and consequent damages sustained by the plaintiff. In other words, the plaintiff's theory of the facts is that the defendant started the train with a violent and unusual jerk, and that defendant provided an insecure footing upon which to stand, and that as a result of such concurring acts, the plaintiff was thrown to the floor of the car and sustained the injuries of which she complains.

Now, the defendant denies any negligence and denies the train started with a violent or unusual jerk, and denies it provided an insecure footing. Defendant takes the further position that the plaintiff herself was negligent in placing herself in a dangerous position by kneeling on the seat, and that negligence contributed substantially to cause her injuries. Those are the simple, plain issues of the case. [323]

You are instructed that the defendant, as a common carrier, owed to the plaintiff, as its passenger, the duty to exercise the highest degree of care for her safety, consistent with the practical operation of the railroad train, and in this connection, the defendant must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.

You are further instructed that, even though the

highest degree of care is required of the defendant in the case, the mere fact that injury has been sustained does not, of itself, apart from the circumstances under which the injury occurred, create a presumption that it was occasioned through the negligence of the defendant.

Now, actionable negligence is an unintentional breach of a legal duty causing injury reasonably foreseeable, without which breach the injury would not have occurred. The actual result of an act or omission is not controlling in determining whether or not there was negligence, nor is the duty of the person to do or omit an act to be estimated by what, after an injury has occurred, then first appears to be a proper precaution, but the question of negligence must be determined according to what should reasonably have been anticipated, in the exercise of the highest degree of care, as likely to happen.

The defendant, in the exercise of the highest degree of [324] care for the safety of its passengers, is required to anticipate that among its passengers will be persons under the disability of age.

You are further instructed that if you find from a preponderance of the evidence in this case, first, that the defendant's employees negligently and carelessly started defendant's train with a violent, unusual, and unnecessary jerk after a scheduled stop, and second, that the defendant negligently provided insecure footing between seats by a hard-surfaced composition floor on which the plaintiff, traveling

as a passenger in Section 12, Car A-16, Touralux, was standing at the time the train was so started, and that as a natural and probable consequence of such concurring and negligent acts, the plaintiff received the injuries of which she complains, then you must find a verdict in favor of the plaintiff and against the defendant.

You are instructed that the law recognizes that, to a certain extent, jerking, jolting, lurching and swaying of railroad trains is unavoidable in the practical operation of a train, and is reasonably incident to its ordinary and careful operation. Therefore, the plaintiff must show by a preponderance of the evidence that such jerk or jolt, if such did occur, was unusual, extraordinary, unnecessary, and the result of the careless and negligent operation of the train by the defendant.

You are instructed that the defendant in this case is [325] required by law to exercise the highest degree of care, prudence and foresight for the safety of its passengers compatible with the practical performance of its duty of transportation, and if you find from a preponderance of the evidence that the defendant has failed to exercise such care and has been guilty of the slightest negligence in this respect, then your verdict must be for the plaintiff and against the defendant.

In addition to denying that any negligence of the defendant proximately caused any injury to the plaintiff, the defendant alleges as an affirmative defense that contributory negligence on the

part of the plaintiff was the proximate cause of any injury which the plaintiff may have sustained. Contributory negligence is negligence on the part of a person injured which, cooperating with the negligence of the defendant, helps substantially in proximately causing the injury. The burden is on the defendant alleging the affirmative defense of contributory negligence to prove by a preponderance of the evidence in the case that the plaintiff was negligent, and that such negligence was a proximate cause of any injury which the plaintiff may have sustained. One who is guilty of contributory negligence may not recover from another for an injury suffered.

Now, negligence is the doing of some act which a reasonably prudent person would not do, or failure to do something which a reasonably prudent person would do, actuated by those causes which ordinarily regulate the conduct of human affairs. It is failure to use ordinary care under the circumstances in the management of one's person, in this case.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves.

The burden is upon the plaintiff to prove by a preponderance of all the evidence, first, that the defendant was negligent in the particulars defined in these instructions, and second, that such negligence was the proximate cause of her injury. If the plaintiff has not fulfilled this burden, the de-

fendant is entitled to a verdict, and you need not consider the issue of contributory negligence. If, however, the plaintiff has fulfilled this burden, then she is entitled to recover from the defendant unless the defense of contributory negligence has been established under the Court's instructions. To establish this defense, the burden is on the defendant to prove by a preponderance of the evidence that the plaintiff was negligent in the particular defined in these instructions, and that such negligence contributed in a substantial degree as a proximate cause of her injuries. If this burden has been fulfilled, then your verdict should be for the defendant.

If you should find for the plaintiff on both issues of negligence and contributory negligence as submitted to you by these instructions, it is then in order for you to consider the matter of damages. While the burden rests upon the party who [327] asserts the affirmative of an issue to prove its allegations by a preponderance of the evidence, this rule does not require demonstration or such degree of proof as produces absolute certainty, because such proof, as you all can well understand, rarely is possible.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if the evidence favoring such party's side of the question is more convincing than that tending to support the contrary side and if it causes the jurors to believe that the

probability or truth of such issue favors that party.

By a preponderance of the evidence is meant the greater weight. The preponderance of evidence in the case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunity of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying and interest or lack of interest, if any, in the result of the case, the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence. In other words, such evidence as when weighed with that opposed to it has [328] more convincing force and produces in your minds conviction of the greater probability of truth.

A party or person asserting a claim or defense, if it is controverted, is required to establish it by the preponderance of the evidence given on that particular issue. If the evidence given on that particular issue is evenly balanced, then the claim or defense is not proven; but the Court instructs you in that connection that, as a matter of law, where two witnesses testify directly opposite to each other on a material point and are the only ones that testify directly to the same point, you are not

bound to consider the evidence evenly balanced. The mere fact that one person testifies on one side and one on the other side does not mean that the evidence is necessarily evenly balanced or the point not proved. You may regard all surrounding facts and circumstances proved on the trial and give credence to one witness over the other if you think such facts and circumstances warrant it.

Now, proximate cause of an injury is that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and without which it would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish an injury. You are, therefore, instructed that if you find from the evidence that the negligence, if any, of the defendant was the proximate cause of the injuries, if any, sustained by [329] the plaintiff, your verdict must be in favor of the plaintiff. This does not mean that the law seeks and recognizes only one proximate cause, injuries consisting of only one factor, one act, one element or circumstance. To the contrary, two or more acts, omissions, elements or circumstances may work concurrently as the efficient cause of injuries.

You are instructed that if, under the evidence and all the instructions of the Court, you believe from a preponderance of the evidence that the plaintiff was guilty of negligence in that the plaintiff was negligent and careless in putting herself in a position of danger from falling or getting her-

self off balance as a result of normal train movements which she, in the exercise of reasonable care, should have anticipated, knowing her own physical limitations, and that such negligence, if any, contributed in any substantial degree to the causing of her injuries, then your verdict should be for the defendant, even though you may further find from the evidence the instructions of the Court that the defendant itself was also negligent in some one or more of the particulars as claimed by the plaintiff. All other allegations of contributory negligence in this case are withdrawn from your consideration. In other words, the only question of contributory negligence that you are to consider in the case is that which might result, if you so find, from the plaintiff herself putting herself in a position of danger from falling or getting herself off balance as a [330] result of normal train movements.

Now, since a corporation can act only through its officers, agents, or employees, the burden is upon the plaintiff to prove by a preponderance of the evidence that the negligence of one or more of the officers, agents, or employees of the defendant was the proximate cause of any injury and consequent damages sustained by the plaintiff, and any negligent act or omission of an officer, agent or employee, in the performance of his duties, is held at law to be the negligence of the employer, the defendant in this case.

Now, you, as jurors, are the sole judges of the credibility of witnesses and the weight their testi-

mony deserves. A witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive, and state of mind, and demeanor and manner while on the stand. Consider also any relationship each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence. [331]

Inconsistencies or discrepancies in the testimony of witnesses or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error, or wilful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness just such credibility, if any, as you may think it deserves.

Your power of judging of the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

As I say, you are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. The test is not the number of witnesses, but which witnesses appeal to your minds and which evidence appeals to your minds as being more accurate and otherwise trustworthy.

A witness false in one part of his testimony is to be distrusted in others.

Evidence is to be estimated not only by its own intrinsic [332] weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

A witness may be discredited or impeached by contradictory evidence. If you believe any witness has been impeached or discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified

falsely concerning any material matter, you have the right to distrust such testimony of that witness, and you may distrust all the evidence of that witness, or give it such credibility as you think it deserves.

Statements and arguments of counsel are not evidence in the case, unless made as admissions or stipulations of fact. When an admission or stipulation of fact is made, the jury must accept the admission or stipulation and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any [333] evidence as to which objection has been sustained by the Court, and any evidence ordered stricken by the Court must be entirely disregarded. You are to consider only the evidence in the case, but in your consideration of the evidence, you are not limited to the bald statements of witnesses. On the contrary, you are permitted to draw from the facts which you find to have been proven such inferences as seem justified in the light of common experience.

Evidence may be either direct or indirect. Direct evidence is that which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish the fact in dispute by proving another fact which, even though true, does not

itself establish the fact in controversy, but which affords an inference of such fact.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce conviction in your minds as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds. The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witnesses and which evidence appears to your minds as being most accurate and trustworthy. [334]

The testimony of a single witness which produces conviction in your minds is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after weighing all the evidence in the case, you believe that the balance of probability points to the accuracy and honesty of one witness.

Plaintiff alleges that by reason of her claimed injuries, proximately resulting from the accident involved in this case, she has sustained general damages in the sum of \$50,000, and has lost the additional sum of \$5,081.40 on account of hospital, drug, nursing and doctor attention and care. These allegations are not evidence, of course, but merely the extent of the plaintiff's claims, and must not be

considered by you as evidence. You are instructed that if, under all the evidence and the instructions of the Court, you shall have occasion to consider the question of damages, the amount asked by plaintiff in her complaint is no criterion or measure of the amount of damages which you should award to the plaintiff, other than you may in no event allow anything in excess thereof. 'To your sound discretion and judgment is confided, in the first place, the question of what compensation will be adequate for the plaintiff, in the event you find plaintiff is entitled to any compensation. You are not permitted in law to allow anything fanciful in the way of damages, but are limited to such sum as, [335] in your judgment, represents reasonable, adequate compensation for such detriment as, under the evidence, you may believe plaintiff has sustained as a proximate result of the acts of which plaintiff has claimed as against defendant, and which you may believe plaintiff has established by a preponderance of the evidence.

In cases seeking damages for personal injury, it is the duty of the Court to instruct the jury upon the rule of the measure of damages, but the jury are not to understand that because of such instructions they are to give damages simply by reason of the fact that instructions have been given to them on that subject. Instructions as to damages are given only to be applied in case plaintiff is justly entitled to a verdict on the evidence. They have no application where, upon the consideration of the

whole case, the liability of the defendant has not been established, nor should they be understood by the jury as conveying any intimation that the Court feels plaintiff is or is not entitled to damages. You are instructed that the amount demanded by the plaintiff in her complaint is not to be taken by you as a criterion of the damages, if any, sustained by her in the event you should find for her.

You are instructed that if you find your verdict in favor of the plaintiff and against the defendant, then, in fixing the amount of damages to be awarded to the plaintiff, you may take into consideration the permanency of her injuries, if any, [336] and her mental and physical pain and suffering caused by the injuries, if any. You may also award her as damages the reasonable value of her hospital, medical, doctor and nursing care, if any, which have been incurred by the plaintiff by reason of such injuries, but in no event can your verdict exceed the sum of \$50,000 general damages or the sum of \$5,081.40, special damages.

Now, the law of the United States permits the judge to comment to the jury on the evidence in the case. In this particular case, as I view it, ladies and gentlemen of the jury, I think that the issues of fact are clear enough so that it isn't necessary for the Court to comment upon the evidence in an effort to assist you. The facts have been presented here and are not complicated. Both sides have argued the case from their point of view, not unreasonably from either side, and so the matter is

for your decision as the judges of the facts of the case. I think it requires no assistance from the Court.

During the course of the trial, I occasionally have asked questions of a witness. I do that in order to bring out facts not then fully covered in the testimony, but do not assume that I hold any opinion on the matters to which my questions relate. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your findings as to the facts. The Court takes no position with reference to facts, merely submits those facts to you, and you as jurors determine [337] them.

It has also been the duty of the Court to admonish an attorney, who, out of zeal for his cause, may have stepped beyond the bounds of proper procedure at the time. You are particularly instructed you are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case. Counsel on both sides have merely, each for his own side, has merely presented here to the best of their ability their theory of the case for your consideration, and the Court had not in mind, and did not intend, and you are not to draw any inference as to the Court's opinion in any matter concerning which he addressed counsel.

Now, your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto.

Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, don't hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but don't surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning [338] a verdict. The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror upon entering the jury room to announce an emphatic opinion on the case or a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved and the juror may later hesitate to recede from an announced position, even when it is shown to be incorrect. You are not partisans, you are judges, the judges of the facts in this case. Your sole interest here is to ascertain the truth, and you will make a worthwhile contribution to the administration of justice if you arrive at an impartial verdict in this case.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note to me by the bailiff. You are not to reveal to me or to any person how the jury stands numerically

or otherwise until you have reached an unanimous verdict.

Upon retiring to the jury room, you will select one of your number to act as foreman. The foreman will preside over your deliberations and will be your spokesman in Court.

Ladies and gentlemen of the jury, at this point, it is necessary for you to leave the court room in order to permit other legal problems to be presented to the Court as a result of the Court's instructions, so you are admonished by the Court not to discuss with each other or anyone else, nor suffer yourselves [339] to be addressed by anyone concerning the subject of this trial, nor are you to form or express any opinion thereon until the case is finally submitted to you. You will withdraw from the courtroom, but remain together in the hall so that you may be called.

(Jury retires from the Courtroom.)

Court: Any objections to the instructions of the Court on the part of the plaintiff?

Mr. McCaffery, Jr.: At this time, the plaintiff objects and excepts to the Court's instructions and the withdrawal of the issue of negligence as contained in Defendant's Instruction No. 6, Defendant's Instruction No. 17, 18, 19 and 20, on the theory that all of the specified acts went to make up a continuous sequence of events, each of which was concurrent and contributed eventually to the plaintiff's injuries; that the Court should have sub-

mitted the question of the sequence of events to the jury with the admonition as to proximate cause for the verdict of the jury upon such a theory of negligence; that to withdraw such a theory after substantial proof of all of the events was prejudicial error as against the plaintiff. Further, that the plaintiff takes exception to the withdrawal by the Court of each individual and specified act of negligence as contained in the Defendant's Instructions 6, 17, 18, 19 and 20, as indicated.

The plaintiff has made her exceptions to the failure of the [340] Court, or the giving by the Court of the instructions of the defendant as numbered, and takes exception to the refusal of the Court to give plaintiff's Instruction No. 14, as offered. Plaintiff has no objection to the giving by the Court, as modified by the Court Plaintiff's Instruction 9. That is all.

Court: The objections are overruled.

Mr. McCaffery, Jr.: Exception.

Mr. Garlington: Before I state the defendant's exceptions, I would like to inquire if the rewritten instruction setting forth the plaintiff's theory bears any numerical designation in the record?

Court: Plaintiff's Instruction 30 I'll make it.

Mr. Garlington: At the conclusion of the Court's charge to the jury, and pursuant to Rule 51, the defendant now excepts to the Court's charge in the following respects:

The defendant excepts to the plaintiff's Instruction designated No. 30, wherein the Court submitted

to the jury the combined issue of the defendant's negligence with regards to a sudden jerk and its negligence with respect to the condition of the floor between the seats, the objection being as follows: first, that there is not sufficient evidence in the record to justify submitting to the jury for consideration the question of whether the defendant negligently and carelessly started its train with a violent, unusual and unnecessary jerk, as stated in the instruction, the evidence being that no such violent and [341] unusual and unnecessary jerk took place; second, that there is not sufficient evidence in the record to justify submitting for consideration of the jury the question of whether the defendant negligently provided an insecure footing between the seats in Car A-16 by reason of a hard-surfaced composition floor, as distinguished from a carpeted floor, and that there is nothing upon which the jury may base a finding of negligence on the part of this defendant in this respect. Next, that the submission of the plaintiff's Instruction No. 30 creates a conflict and confusion with other instructions on the issues affecting the matter of the jerk of the train and the insecure footing by virtue of the composition floor between the seat, the Court having ruled that in the individual instances and separately there is insufficient evidence to go to the jury on either of those theories; and next number, that the effect of plaintiff's Instruction No. 30 is to combine two theories, each of which is in itself insufficiently supported by evidence to establish lia-

bility, and that by so combining these theories to establish another theory of liability which would not otherwise exist, the Court is incorrectly stating the law applicable to the case. It is the defendant's contention in this respect that the effect of Instruction No. 30 is analogous to attempting to add zero plus zero to obtain one, in that (interrupted).

Court: You needn't make an argument, Mr. Garlington.

Mr. Garlington: I understand. I am trying to make my [342] point clear in the record.

Court: Proceed.

Mr. Garlington: The defendant further excepts to the Court's charge with respect to the instruction on contributory negligence in that the Court has limited and restricted the issue of contributory negligence to the act of the plaintiff in getting herself in a position of danger from falling or getting off balance, and has eliminated from the consideration of the jury the remaining allegations of contributory negligence set forth in the defendant's further defense as offered, it being the position of the defendant that there was competent evidence of other acts and elements of contributory negligence on the part of the plaintiff which should be submitted to the jury for consideration.

Court: Very well, the objections are overruled. Call the jury in.

(Jury returns to the Courtroom.)

Court: Ladies and gentlemen of the jury, the

case is ready to be submitted to you. Forms of verdict have been prepared for your convenience and will be handed to you by the bailiff, and you will take them to the jury room with you, and when you have reached an unanimous agreement as to your verdict, you will have your foreman fill in, date and sign the form which sets forth the verdict upon which you agree, and then you will return with your verdict to the courtroom, sign [343] that one verdict upon which you agree, your foreman will.

It is proper to add again the caution that nothing said in these instructions, nothing in any form of verdict prepared for your convenience is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury. Swear the bailiffs.

(Bailiffs sworn.)

Court: You will now retire to the jury room with the bailiffs.

DEFENDANT'S INSTRUCTION NO. D-6,
GIVEN BY THE COURT AND EXCEPTED
TO BY THE PLAINTIFF:

“You are instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue of whether the defendant's employees were negligent and careless in failing to assist the plaintiff to make

a change in her permanent seat in the train, and therefore that issue is withdrawn from your consideration.”

DEFENDANT’S INSTRUCTION NO. D-17,
GIVEN BY THE COURT AND EXCEPTED
TO BY THE PLAINTIFF:

“You are instructed that there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue of whether the defendant negligently furnished to the plaintiff inadequate and unsafe facilities for [344] the accommodation of her hat and coat, by reason of the size and location of the hook in the section, as alleged in the complaint, and therefore that issue is withdrawn from your consideration.”

DEFENDANT’S INSTRUCTION NO. D-18,
GIVEN BY THE COURT AND EXCEPTED
TO BY THE PLAINTIFF:

“You are instructed that there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant negligently started the train with a violent and unusual jerk, as alleged in the complaint, and therefore that issue is withdrawn from your consideration.”

DEFENDANT'S INSTRUCTION NO. D-19,
GIVEN BY THE COURT AND EXCEPTED
TO BY THE PLAINTIFF:

"You are instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue of duplicating the sale of the plaintiff's seat space by which the plaintiff was unable to locate herself permanently in her seat before changing her place in her section, and therefore that issue is withdrawn from your consideration."

DEFENDANT'S INSTRUCTION NO. D-20,
GIVEN BY THE COURT AND EXCEPTED
TO BY THE PLAINTIFF:

"You are instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant was negligent in having a hard surface composition floor material in [345] its Tourahux coaches, and therefore that issue is withdrawn from your consideration."

PLAINTIFF'S OFFERED INSTRUCTION NO.
14, REFUSED BY THE COURT AND RE-
FUSAL EXCEPTED TO BY PLAINTIFF:

"You are instructed that in this case expert testimony has been received in evidence. You are to consider such expert testimony like any other testimony and give it such weight as in your judgment the testimony deserves, if any."

PLAINTIFF'S INSTRUCTION NO. 30, GIVEN
BY THE COURT AND EXCEPTED TO BY
THE DEFENDANT:

“You are instructed that the defendant, in the exercise of the highest degree of care for the safety of its passengers, is required to anticipate that among its passengers will be persons under the disability of age;

You are further instructed that if you find from a preponderance of the evidence in this case first, that the defendant's employees negligently and carelessly started defendant's train with a violent, unusual and unnecessary jerk, after a scheduled stop, and second, that the defendant negligently provided insecure footing between the seats by a hard surfaced composition floor, on which the plaintiff, traveling as a passenger in Section 12, Car A-16 Touralux, was standing at the time the train was so started, and that as a natural and probable consequence [346] of such concurring and negligent acts, the plaintiff received the injuries of which she complains, then you must find your verdict in favor of the plaintiff and against the defendant.” [347]

REPORTER'S CERTIFICATE

United States of America,
State of Montana—ss.

I, John J. Parker, do hereby certify that I am the official Court Reporter in the above entitled court; that the foregoing transcript is a full, true and correct transcript of the proceedings had and testimony taken in the cause of Mary Ann Harrington, Plaintiff, vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, Defendant, being Civil Cause No. 245 in the Butte Division of said Court, tried before the Honorable W. D. Murray, United States District Judge, sitting with a jury, at Butte, Montana, on the 19th, 20th, 21st and 24th days of October, 1949.

Dated this 3rd day of December, 1949.

/s/ JOHN J. PARKER,
Official Court Reporter.

[Endorsed]: Filed December 3, 1949. [348]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes Now Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, the defendant above named, and pursuant to Rule 75 (a) hereby serves and files its designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal in the above entitled cause:

1. Names and addresses of attorneys of record.
2. Plaintiff's complaint.
3. Defendant's answer.
4. Reporter's transcript of testimony, excluding opening statements of counsel to the jury.
5. Verdict.
6. Judgment.
7. Defendant's motion for judgment notwithstanding the verdict.
8. Order of the court dated November 26, 1949, denying defendant's motion for judgment.
9. Notice of appeal.
10. Order of transmission of original exhibits.
11. Designation of contents of record on appeal.
12. Statement of points upon which defendant intends to rely.

13. Certificate of Clerk of Court.

MURPHY, GARLINGTON &
PAULY,

/s/ J. C. GARLINGTON,

/s/ H. C. PAULY,

611 Montana Building, Missoula, Montana, Attorneys for Defendant.

[Endorsed]: Filed December 28, 1949.

CLERK'S CERTIFICATE OF TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consists of the original papers, viz: Judgment Roll, consisting of Plaintiff's Complaint, Defendant's Answer, Verdict and Judgment; Reporter's Transcript of Testimony; Defendant's Motion for Judgment, notwithstanding the Verdict; Order of the court dated November 26, 1949, denying Defendant's Motion for Judgment; Notice of Appeal; Order of Transmission of Original Exhibits; Designation of Contents of Record on Appeal; Statement of Points, upon which Defendant intends to rely, together with

Names and Addresses of Attorneys of Record and Certificate of Clerk of Court, the same being all matters designated by the parties and required by the rule as the record on appeal in Case No. 245, Mary Ann Harrington vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation.

I further certify that the costs of said Transcript amount to the sum of Five and No/100 Dollars (\$5.00), and have been paid by the Appellant.

Witness my hand and the seal of said District Court at Butte, Montana, this 11th day of January, A. D. 1950.

H. H. WALKER,
Clerk.

[Seal] By /s/ D. F. HOLLAND,
Deputy Clerk.

[Endorsed]: No. 12451. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, Appellant, vs. Mary Ann Harrington, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed January 13, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12451

CHICAGO, MILWAUKEE, ST. PAUL & PA-
CIFIC RAILROAD COMPANY, a corpora-
tion,

Appellant,

vs.

MARY ANN HARRINGTON,

Appellee.

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL, AND STATEMENT OF
POINTS ON APPEAL

For the purpose of complying with Rule 19, of the above named Court, appellant hereby adopts its designation of contents of record on appeal, and its statement of points upon which defendant intends to rely on appeal, filed in the above entitled cause in the District Court on the 28th day of December, 1949, as appellant's statement of points on which it intends to rely on this appeal and its designation of the parts of the record necessary for the consideration thereof, as required by Section 6 of said Rule 19.

Dated This 14th day of January, 1950.

MURPHY, GARLINGTON
& PAULY.

/s/ J. C. GARLINGTON,

/s/ H. C. PAULY,

Attorneys for Appellant.

Service of the foregoing designation and statement of points by receipt of copy is acknowledged this 16 day of January, 1950.

McCAFFERY & McCAFFERY,

/s/ SOUTHMORE P. MYERS,

Attorneys for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed January 23, 1950.

